TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 107.

THOMAS MILNER HARRISON, PLAINTIFF IN ERROR,

vs.

J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN, AND GEORGE D. MOORE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED AUGUST 30, 1905.

(19,890.)

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JUDD & DETWEILER) INC.), PRINTERS, WASHINGTON, D. C., JULY 9, 1906.

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1 In the Circuit Court of the First Circuit, Hawaiian Islands, *ss:*

THOMAS MILNER HARRISON
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, and DOROTHEA EMERSON.

The Republic of Hawaii to the Marshal of the Hawaiian Islands, or his Deputy, Greeting:

You are commanded to summon J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Emerson Defendants in case they shall file written answer within twenty days after service hereof, to be and appear before the said Circuit Court at the February Term thereof, to be holden at Honolulu Island of Oahu on Monday the 5th day of February next, at ten o'clock A. M., to show cause why the claim of Thomas Milner Harrison Plaintiff should not be awarded to him pursuant to the tenor of his annexed Petition.

And you are further commanded to — and have you then there this Writ with full return of your proceedings thereon.

Witness Hon. A. Perry First Judge of the Circuit Court of the First Circuit, at Honolulu, Oahu this 29th day of November 1899.

(S'g.) J. A. THOMPSON, *Clerk.*

2 Endorsed: No. 4464, Law Division. Docket 16/438. Circuit Court First Circuit. Thomas M. Harrison *vs.* J. A. Magoon, *et al.* Summons for February Term, 1900. Issued November 29, 1899 at 2:30 o'clock P. M. Returned by the Marshal December 27, 1899. J. A. Thompson, Clerk.

I hereby certify the service of the within Writ as per returns of Service hereon made by Officer Chas. H. Baker, at Honolulu, Island of Oahu, on the 29th day of November, A. D. 1899.

(S'g.) CHAS. F. CHILLINGWORTH,
Deputy Marshal.

Delivering a certified copy thereof, and of the Petition annexed to the said J. A. Magoon and L. C. Ables at Honolulu aforesaid as directed. Dated November 29, 1899.

(S'g.) CHAS. H. BAKER,
Police Officer.

(S'g.) B. H. BROWN, JR.,
Special Police Officer.

On F. B. McStocker at Keaau, Puna, Hawaii, 18 miles on 7th day of Dec. A. D., 1899, showing him the Original.

I hereby certify the service of the written Writ per returns of Services thereon by Special officer B. H. Brown, Jr.

(Sig.) R. A. LYMAN,
Dep't. Sheriff of Hawaii.

Received a copy of the within summons and complaint and further service waived.

(S'g.) DOROTHEA EMERSON,
(S'g.) By Her Att'y, J. ALFRED MAGOON.

Nov. 29th/99.

3 In the Circuit Court of the First Circuit, Hawaiian Islands, February Term.

THOMAS MILNER HARRISON
vs.
J. A. MAGOON, F. B. McSTOCKER, L. C. ABLES, and DOROTHEA EMERSON.

Assumpsit.

Declaration.

To the Hon. A. Perry, First Judge of the Circuit Court of the First Circuit:

The undersigned, a foreigner by birth, plaintiff, claims of J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Emerson *née* Lamb, also foreigners by birth, residing at Honolulu, Island of Oahu, defendants, the sum of Ten Thousand ($10,000.00) Dollars, with legal interest from March 10, 1898, for damages resulting to him for injury done by said defendants, and for cause of action alleges:

That prior to and on the 20th day of September A. D. 1897, the said defendants together with certain other persons, to wit, T. E. Cowart, J. H. Kirkpatrick, George D. Moore, A. E. Powter and James Welfenden were carrying on business as copartners in the Colony of New Zealand and elsewhere under the firm name or style of the African Pacific and Indian Hagey Company.

That on the date last above mentioned, at Auckland, New Zealand aforesaid, the said defendants and their said copartners entered into an agreement with the said plaintiff and one Alfred Edward Gilmore, a copy whereof is hereto attached and made a part hereof, whereby it was agreed that the colony of Tasmania, should be the place or sphere of business under said agreement, and that the
4 plaintiff should go to said Colony and manage the business there.

That by paragraph 4 of said agreement it was provided that if at or before the expiration of six months from the departure of the plaintiff from New Zealand to Tasmania the plaintiff should be dissatisfied with the condition of the said business in Tasmania the defendants would give the plaintiff stock of the market value of an amount equal to the sum paid by plaintiff as a consideration under said agreement, that is to say, stock of the market value of Two

Thousand Pounds (£2000) in some district, other than Tasmania of the field of operations of said partnership.

That in pursuance with the agreement, the plaintiff on or about January 17th, 1898, left New Zealand and went to Tasmania aforesaid for the purpose of managing and carrying on the said business, and that he did so manage and carry on the same at the City of Hobart in Tasmania from the first day of February 1898 to the first day of March 1898.

That the business was not successful and the plaintiff became dissatisfied with its condition and so, on or about the tenth day of March 1898, he notified the said partners to that effect.

That on or about the said tenth day of March 1898, plaintiff made demand upon said partners that under the term of paragraph 4 of said agreement, they should deliver to him stock of the market value of Two Thousand Pounds (£2000.) in some District other than Tasmania of the field of operations of said partnership.

That said partners neglected and refused and still neglect and refuse to deliver said stock or any part thereof or the value thereof to plaintiff.

That on or about the first day of March 1898, the said plaintiff did pay, transfer and deliver unto the said parties of the first part named in said agreement all funds, moneys and assets of said partnership in plaintiff's possession also an account of all disbursements and expenditures made by him for and on account of said partnership, and that said funds, moneys, assets and account were accepted and received by the said partners as true and correct.

That at the present time no unsettled account or indebtedness exists between said plaintiff and his partners except as to claim of £2000. with interest and costs.

Wherefore plaintiff prays judgment against said defendants for said sum of $10,000. with interest and costs.

Second Count.

The undersigned also claims of the said J. A. Magoon, F. B. McStocker, L. C. Ables, and Dorothea Emerson *née* Lamb, defendants, the sum of Ten Thousand Six Hundred ($10600.00) Dollars with legal interest from June 13th, 1899, for that heretofore, to wit, on the 18th day of April A. D. 1898, at the City of Auckland in the Colony of New Zealand, the said plaintiff brought his certain action in the Supreme Court of New Zealand, Northern District, against the defendants together with T. E. Cowart, J. H. Kirkpatrick, George D. Moore, A. E. Powter and James Wolfenden, as partners, doing business together under the style or firm name of The African Pacific and Indian Hagey Company, to recover from them the sum of Two Thousand Pounds (£2000.) damages, and costs.

That at the time of said action and the rendition of the judgment therein, hereinafter mentioned, the said Court was a Court of Record in said City, having jurisdiction over the parties plaintiff and defendant, and also of the subject matter in and of said action.

That thereafter, to wit, on the 13th day of June A. D. 1899, such proceedings were had in said action, that said Court ren-
6 dered judgment in favor of this plaintiff and against the defendants therein, other than the said James Wolfenden and A. E. Powter for the sum of Two Thousand One hundred and Twenty Pounds (£2120.) damages and costs.

That payment of the amount of said judgment or any part thereof has never been made, and the sum now due this plaintiff upon said judgment, with interest, is $10,838.50.

Wherefore plaintiff prays judgment against the defendants herein for said sum of $10600.00 with interest and costs.

And plaintiff asks the process of this Court to cite the said Defendants to appear and answer this complaint before a jury of the country at the February 1900 Term of this Court, unless otherwise sooner disposed of by judicial authority.

Dated, June 13th, 1900.

(Sig.) T. M. HARRISON.

(Sig.) ROBERTSON & WILDER,
Attorneys for Plaintiff.

HAWAIIAN ISLANDS, *Island of Oahu, ss:*

Thomas Milner Harrison being duly sworn, on oath deposes and says, that he is the plaintiff named in the above declaration, that he knows the contents thereof and that the same are true.

(Sig.) T. M. HARRISON.

Subscribed and sworn to before me this 13th day of June, A. D. 1900.

(Sig.) A. A. WILDER,
Notary Public, First Judicial Circuit.

7 "A."

[N. Z. Stamp 11 1/10/97 T. M. H.]

Memorandum of Agreement.

Memorandum of Agreement made this 20th day of September, 1897, between The African Pacific and Indian Hagey Company, an association, of partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, the said partnership being composed of the following members: T. E. Cowert, J. H. Kirkpatrick and Geo. D. Moore, of the State of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore, and Thomas Milner Harrison both of the city of Auckland, in the Colony of New Zealand, parties of the second part.

Whereas the said Company have the exclusive right and title to the Hagey formulas for Alcoholism and Narcotism in and for the

Colony of Tasmania and whereas the said Company have by contract entered the — day of May 1897 with James Wolfenden secured certain rights relative to the use of the Thompson formulas for said diseases and whereas the said parties hereto propose to enter into partnership for the purpose of using, administering and vending to others the right to use and administer the said remedies in the Colony of Tasmania and in no other place or places.

Now these presents witness*eth*

For and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated.

1. That the capital of the said partnership shall be (5000) five thousand pounds, of which the said Company shall own
8 (11/20) eleven twentieths, in consideration of granting all their exclusive rights to use the said remedies in the said Colony to the said partnership hereby formed; and the said Company will supply the said partnership hereby formed with the said remedies at the cost price thereof, until such time as the formulas for the preparation of the same may be given the said partnership hereby formed; and the said Company will not use the *the* said remedies in the said Colony during the existence of the said partnership hereby formed otherwise than as partners therein; and they hereby convey to the said partnership hereby formed all their rights, privileges and recourses against others than the said partnership using the said remedy in the said Colony.

2. That the said Gilmore and the said Harrison have paid the sum of (£2250) two thousand two hundred and fifty pounds to the said Company for the other (9/20) nine twentieths interest in the said partnership hereby formed, the receipt whereof is hereby acknowledged.

3. That the said Gilmore and the said Harrison shall conduct the business of the said partnership in Tasmania each at a salary of (£40) forty pounds per month to be a first charge on the receipts of the business after the current expenses have been paid. The said Harrison to act as manager of the said partnership hereby formed and the said Gilmore to act as Secretary Treasurer thereof.

4. That if at or before the expiration of a period of six months from the date of the departure of the said Gilmore or the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (£2250) said two thousand two hundred and fifty pounds mentioned in Clause (2) two hereof in some
9 other district of the Compan*ie's* field of operations in exchange for the portion of the said (£2250) Two Thousand Two Hundred and Fifty Pounds taken by him, and the said Company reserve the right either at the suggestion of the partners in Tasmania or at their suggestion to send one of their own number or

some competent man to aid and assist the partners in Tasmania at the same salary and with the same powers as either the said Harrison or the said Gilmore.

5. That the respective interests of the said Harrison and the said Gilmore in the partnership business in Tasmania are as follows, the said Harrison to have a (2/5) Two fifths interest for which he has paid (£2000) two thousand pounds as mentioned in Clause (2) two hereof and referred to in Clause (4) four hereof, and the said Gilmore a (1/20) one twentieth interest in the said partnership for which he has paid (£250) two hundred and fifty pounds as referred to in Clauses (2) two and (4) four hereof.

6. That a fund necessary for the starting of the business in Tasmania shall be raised by the partnership hereby formed, and placed in the hands of the said Gilmore and the said Harrison.

7. That the said Company reserves the right to dispose of a (1/20) one twentieth interest in the partnership hereby formed, for the sum of (£250) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

In Witness Whereof the said parties hereto have set their hands this 1st day of October 1897.

(Sig.) T. E. COWART.
J. H. KIRKPATRICK.
J. A. MAGOON,
By His Att'ys, J. H. KIRKPATRICK,
T. E. COWART.
DOROTHEA LAMB,
By Her Att'ys, J. H. KIRKPATRICK,
T. E. COWART.
A. E. POWTER,
By His Att'y, T. E. COWART.
LEMUEL C. ABLES.
FRANK B. McSTOCKER,
Per His Att'y, L. C. ABLES.
J. WOLFENDEN.
T. M. HARRISON.
A. E. GILMORE.

Signed in the presence of
W. C. ROBISON, *N. L.*

10 Endorsed: Circuit Court, First Circuit. Thomas Milner Harrison *vs.* J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Emerson. L. 4464—16/438. Amended Declaration. Filed June 13th, 1900, at 4:54 P. M. (Sig.) P. D. Kellett, Jr., Clerk.

11 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

THOMAS MILNER HARRISON, Plaintiff,
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, and DOROTHY EMERSON, Defendants.

Assumpsit.

Defendants' Demurrer.

Now comes the defendants in the above entitled cause, by their attorneys J. A. Magoon, I. M. Long and Kinney, Ballou & McClanahan, and demur to the plaintiff's amended declaration filed herein June 13, 1900, and for causes of demurrer allege:—

I.

That there is a defect or non-joinder of parties defendant.

II.

That several causes of action have been improperly united.

III.

That the declaration does not set forth facts sufficient to constitute a cause of action.

IV.

That the Court has no jurisdiction of the subject matter set forth in the first count of said declaration, nor does said count allege juri-dictional facts.

V.

12 That the Court has no jurisdiction of the subject matter set forth in the second count of said declaration nor does said count allege juri-dictional facts.

VI.

That the plaintiff has failed to allege the existence in some other District than Tasmania of stock of the market value of Two Thousand pounds (2000).

VII.

That it appears by said complaint that said plaintiff and these defendants are co-partners in respect to the matters and things in said declaration alleged, and that no action at law will lie between said co-partners for such matters and things

VIII.

That the declaration is ambiguous, unintelligible and uncertain, in that it does not set forth the continuance nor the dissolution of the partnership relations created by the memorandum of agreement thereto attached.

J. A. MAGOON,
F. B. McSTOCKER,
L. C. ABLES, AND
DOROTHY EMERSON,
(Sig.) By Their Attorneys, J. A. MAGOON,
(Sig.) I. M. LONG,
(Sig.) KINNEY, BALLOU & McCLANAHAN.

Endorsed: Circuit Court First Circuit. Thos. Milner Harrison *vs.* J. A. Magoon, F. B. McStocker, L. C. Ables & Dorothy Emerson. Defendants' Demurrer. Filed Jul. 9, 1900. (Sig.) George Lucas, Clerk.

13 In the Circuit Court, First Circuit of the Territory of Hawaii, August Term, 1900.

THOMAS MILNER HARRISON
vs.
J. A. MAGOON, F. B. McSTOCKER, L. C. ABLES, and DOROTHEA EMERSON.

Decision on Demurrer.

This cause came before the court on hearing on the defendants' demurrer on Tuesday, July 31st, 1900, Messrs. J. A. Magoon, I. M. Long, Kinney, Ballou & McClanahan and H. A. Bigelow appearing for the defendants, and Messrs. Robertson & Wilder appearing for the plaintiff, and the plaintiff having also appeared in person; the court having heard the arguments of counsel orders that the demurrer be and it is hereby sustained.

Dated, August 17th A. D. 1900.

(Sig.) R. D. SILLIMAN,
Second Judge of the Circuit Court of the First Circuit.

Memorandum.

As to the first count, it being a count on a joint obligation I think that all the joint obligors should be joined as defendants as required by our statute, especially in the absence of any allegations in the complaint setting forth that J. E. Cowart, J. H. Kirkpatrick, George D. Moore, A. E. Powter and James Wolfenden are without the jurisdiction of this court. I do not believe it is necessary to raise

this point by plea in abatement setting forth that the parties
14 not joined are without the jurisdiction of the court.

As to the second count, I do not think it sets forth facts sufficient to show that any valid judgment has been rendered in the Supreme Court of New Zealand, Northern District; in that there is no sufficient allegation of the service of the process of the court upon the defendant or otherwise setting forth facts which show that said court, which is a court of a foreign jurisdiction, had any jurisdiction of the parties against whom said judgment is rendered.

I think on an inspection of the first count of the declaration and the written memorandum of agreement, attached to the declaration and made a part of the said count, it is apparent that a partnership relation was entered into between the plaintiff and the defendants named in the declaration together with certain other persons; and I think that there is no sufficient allegation contained in the declaration of such an accounting between the partners as would result in a specified liquidated sum due to the plaintiff which he would be entitled to recover in a suit at law. Such accounting ought to show that the item of £2000 was considered by the partners and that the defendants who are sued promised to pay the same as in an account stated.

I also believe that the allegations of the complaint are not so definite and certain as they should be made, especially with regard to the facts pertaining to the relation of the plaintiff and defendants, the agreemnt that was entered into between them, the accounting or the other steps that were taken to wind up the affairs of the partnership or to show how the partnership terminated if there was a final end thereof and also in regard to the obtaining of a judgment in the New Zealand Court I think all the jurisdictional facts should be averred.

(Sig.) R. D. S.

15 Endorsed:—Circuit Court First Circuit. Thomas Milner Harrison *vs.* J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothy Emerson. Decision. Filed August 17th A. D. 1900. (Sig.) P. D. Kellett, Jr. Clerk.

16 In the Circuit Court of the First Circuit, Territory of Hawaii, August Term, 1900.

THOMAS MILNER HARRISON
vs.
J. A. MAGOON, L. C. ABLES, F. B. MCSTOCKER and DOROTHEA EMERSON.

Assumpsit.

Exception.

Said plaintiff hereby excepts to the ruling made herein by Judge Silliman on August 17th, 1900, sustaining defendants' demurrer to

plaintiff's complaint herein on the ground that same is contrary to the law.

Dated August 21, 1900.

T. M. HARRISON,
(Sig.) By His Attorneys, ROBERTSON & WILDER.

The above exception is hereby allowed.

(Sig.) R. D. SILLIMAN,
Second Judge, Circuit Court, First Circuit.

Endorsed: Circuit Court First Circuit. Thomas Milner Harrison *vs.* J. A. Magoon, L. C. Ables, F. B. McStocker and Dorothea Emerson. Exception. Filed August 22, 1900. (Sig.) George Lucas, clerk.

17 In the Circuit Court of the First Circuit, Territory of Hawaii, February Term, 1900.

THOMAS M. HARRISON
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES and DOROTHEA EMERSON.

Assumpsit.

Plaintiff's Bill of Exceptions.

Be it remembered that the above entitled cause came on for argument on defendant's demurrer to plaintiff's complaint herein before Judge Stanley, on the 12th day of January 1900 at which time plaintiff asked leave to amend said complaint by attaching thereto a copy of the agreement therein referred to. The Court allowed the amendment and granted the defendants time to answer said complaint so amended as aforesaid.

That thereafter the defendants filed a demurrer to plaintiff's said amended complaint which was argued before and submitted to Judge Davis who on the 25th day of May 1900, sustained said demurrer. The plaintiff duly excepted to said ruling and the exception was allowed.

That thereafter, to wit, on the 5th day of June 1900, plaintiff filed a motion for leave to further amend his said complaint as in said motion set forth. Said motion having been granted and the amendment allowed the defendants filed a demurrer to the said complaint as so amended which said demurrer was argued before and submitted to Judge Silliman, who on the 17th day of August 1900, filed a decision sustaining said demurrer. That plaintiff duly
18 excepted to said ruling and decision on the ground that the same was contrary to the law, and the exception was allowed.

The record in the cause, including all pleadings, motions and papers filed herein is hereby made part of this Bill of Exceptions.

Dated, August 24th, 1900.

THOMAS M. HARRISON,
(Sig.) By His Attorneys, ROBERTSON & WILDER.

The foregoing Bill of Exceptions being conformable to the truth is hereby allowed. And I hereby certify that the record contains all the pleadings and papers necessary to a proper consideration of the case by the Supreme Court.

(Sig.) R. D. SILLIMAN,
Second Judge, Circuit Court, First Circuit.

Endorsed and Filed Aug. 27, 1900.

19 Supreme Court of the Territory of Hawaii, December Term, 1900.

T. M. HARRISON
v.
J. A. MAGOON ET AL.

HONOLULU, FRIDAY, *January* 4, 1901.

Clerk's Minutes.

Exceptions from Circuit Court, First Circuit.
Before Frear C. J. Galbraith and Perry JJ.
Robertson and Wilder and Harrison for Plaintiff.
Kinney, Ballou, McClanahan, Biglow and Magoon for Defendants.
Mr. Robertson reads the pleadings.
Mr. Biglow Argues.
Mr. Magoon Argues.
Mr. Harrison Argues.
At 4 P. M. the Court adjourns for the day.

SATURDAY, *January 5th*, 1901.

Mr. Harrison continues with his argument.
Mr. Robertson Argues.
Mr. Biglow Replies.
The Court takes the matter under consideration.

20 In the Supreme Court of the Territory of Hawaii, December Term, 1900.

THOMAS MILNER HARRISON
v.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES and DOROTHEA EMERSON *née* LAMB.

Exceptions from Circuit Court, First Circuit.
Submitted January 5, 1901.
Decided April 25, 1901.
Frear, C. J., Galbraith and Perry, JJ.

21 G., H., the defendants and certain other person- entered into a written agreement to form a copartnership to engage in a

certain business in Tasmania. In said instrument it was agreed, *inter alia* "that if at or before the expiration of a period of six months" from a certain date, "the said G. or the said H. is not satisfied with the condition of the said partnership business in Tasmania," certain of the partners "will give the said G. or the said H. stock of the market value to the amount paid by him of the 2250£ mentioned in clause 2 hereof in some other district of the company's field of operation in exchange for the portion of the said 2250£ taken by him."

The clause 2 referred to shows that G. and H. together paid 2250£ for a nine-twentieth interest in the partnership, and another clause that of this sum G. paid 250£ for a one-twentieth interest and H. 2000£ for a two-fifths interest. H. brought an action to recover damages for breach of the said agreement to deliver stock. Held, on demurrer,

Either G. or H. or both may, upon the happening of the contingency stated, recover damages, G. for the failure to deliver to him the stock named of the market value of 250£ and H. for the failure to deliver to him such stock of the market value of 2000£, that the said agreement gives neither to G. nor to H. the right to recover stock of the market value of 2250£ or damages for failure to deliver said last named amount of stock and that it is unnecessary for H. to allege in this case that G. has not sued for or recovered any of said stock or damages for failure to deliver the same.

In the said agreement the said promisors and not the promisees took the risk as to whether or not at the time of the happening of the contingency stated the stock mentioned would be in existence, and it it therefore unnecessary for the plaintiff to allege that such stock is or was in existence.

The statement in the declaration that plaintiff "made demand upon said partners that under the terms of paragraph 4 of
22 said agreement they should deliver to him stock," etc., is a sufficient allegation of a demand for such stock in accordance with the terms of said paragraph 4, to wit, in exchange for plaintiff's interest in "the partnership hereby formed," and of an offer to give such interest in exchange.

The said promise to deliver stock to the plaintiff was based upon a valuable consideration, to wit, the payment by the plaintiff of the sum of 2000£ and his agreement to proceed to Tasmania to conduct the business of the partnership.

Assuming that the language of the agreement is ambiguous as to what stock is meant and that this fact might prevent the maintenance of a bill for specific performance of the contract to deliver such stock, an action at law for recovery of damages may nevertheless be maintained because it appears from the face of the declaration that the defendants have failed and refused to deliver *any* stock and have thereby committed a breach of the agreement, giving the plaintiff the right to recover at least nominal damages.

While the present action is one between persons who are partners in a certain business, the plaintiff is not suing any partnership of which he is a member; the agreement sued on is an express personal

contract between individuals who are partners, but not in their capacity of partners, is wholly distinct from partnership affairs and does not involve the consideration or require the examination of the partnership accounts; and under the circumstances an action at law may be maintained.

On the subject of jurisdiction, it is sufficient to allege in a declaration on a foreign judgment "that at the time of said action and the rendition of the judgment hereinafter mentioned, the said court was a court of record in said City, having jurisdiction over the parties plaintiff and defendant, and also of the subject matter in and of the said action;" and this even though it appears by inference or otherwise from the face of the declaration that at the time of the
23 institution of the action in the foreign court or of the rendition of judgment therein, the defendants were non-residents. It is not necessary to allege more specifically that direct personal service was made or that the defendants voluntarily submitted to the jurisdiction of such foreign court.

Where a foreign court upon a joint cause of action renders judgment against some and not all of the joint defendants, such error in the proceeding, assuming, but not deciding that the judgment was erroneous, is at most a mere irregularity and not matter affecting the jurisdiction of the foreign court and therefore not open to review in an action on such foreign judgment.

An action on a judgment is, within the meaning of Section 1259 of the Civil Laws of 1897, an action arising out of an implied contract, and a count on such a judgment may, under said statute, properly be joined with a count on an express and entirely distinct contract between the same parties.

A Plaintiff may properly join in the same action a count on a foreign judgment and a count on the original cause of action (between the same parties) on which the foreign judgment was based and rendered.

The agreement to deliver stock first hereinabove recited is, in view of the language of the instrument which is quoted in full in the opinion, held to be a joint and several contract. Under Section 1222 of the Civil Laws of 1897, it is necessary to join as defendants in the action all of the parties to the said joint and several contract.

In an action on a judgment, it is necessary to join as parties defendant all the living judgment debtors, except those who are out of the jurisdiction.

24 *Opinion of the Court.*

By PERRY, *J.*:

This is an action of assumpsit wherein the plaintiff declares on two counts. In the first count, he claims of the defendants the sum of $10,000., with legal interest from March 10, 1898, for damages resulting to him by reason of the breach of a certain agreement entered into at Auckland, New Zealand on the 20th day of September, 1897, by the defendants and certain other persons, of the one part,

and one Alfred Edward Gilmore and the plaintiff of the other part. The agreement was in words and figures as follows:

"Memorandum of Agreement made this 20th day of September, 1897, between The African Pacific and Indian Hagey Company, an association of partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, the —— said partnership being composed of the following members:—T. E. Cowart, J. H. Kirkpatrick and Geo. D. Moore, of the State of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Abies and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore and Thomas Milner Harrison, both of the City of Auckland, in the Colony of New Zealand, parties of the second part.

"Whereas the said Company have the exclusive right and title to the Hagey formulas for Alc-holism and Narcotism in and for the Colony of —— Tasmania and whereas the said Company have by contract entered the — day of May, 1897, with James Wolfenden secured certain rights relative to the use of the Thompson formulas for said diseases and whereas the said parties hereto propose to enter into partnership for the purpose of using, administering and vending to others the right to use and administer the said remedies in the Colony of Tasmania and in no other place or places.

"Now these presents witnesseth.

"For and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinbefore stated.

"1. That the Capital of the said partnership shall be (£5000) five thousand pounds, of which the said Company shall own (11/20) eleven-twentieths, in consideration of granting all their exclusive rights to use the remedies in the said Colony to the said partnership hereby formed; and the said company will supply the said partnership hereby formed with the said remedies at the cost price thereof, until such time as the formulas for the preparation of the same may be given the said partnership hereby formed; and the said Company will not use the said remedies in the said Colony during the existence of the said partnership hereby formed otherwise than as partners therein; and they hereby convey to the said partnership hereby formed all their rights, privileges and recourses against others than the said partnership using the said remedy in the said Colony.

25 "2. That the said Gilmore and the said Harrison have paid the sum of (£2250) Two Thousand Two Hundred and Fifty Pounds to the said Company for the other (9/20) nine-twentieths interest in the said partnership hereby formed, the receipt whereof is hereby acknowledged.

"3. That the said Gilmore and the said Harrison shall conduct the business of the said partnership in Tasmania each at a salary of (£40) Forty Pounds per month to be a first charge on the receipts of the business after the current expenses have been paid. The said

Harrison to act as manager of the said partnership hereby formed and the said Gilmore to act as Secretary Treasurer thereof.

"4. That if at or before the expiration of a period of six months from the date of the departure of the said Gilmore or the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (£2250) said Two Thousand Two Hundred and Fifty Pounds mentioned in Clause (2) two hereof in some other District of the Company's field of operation in exchange for the portion of the said (£2250) Two Thousand Two Hundred and Fifty Pounds taken by him, and the said Company reserve the right either at the suggestion of the partners in Tasmania or at their own suggestion to send one of their own number or some competent man to aid and assist the partners in Tasmania at the same salary and with the same powers as either the said Harrison or the said Gilmore.

"5. That the respective interests of the said Harrison and the said Gilmore in the partnership business in Tasmania are as follows, the said Harrison to have a (2/5) two-fifths interest for which he has paid (£2000) Two Thousand Pounds as mentioned in Clause (2) two hereof and referred to in Clause (4) four hereof, and the said Gilmore a (1/20) one-twentieth interest in the said partnership for which he has paid (£250) two hundred and fifty pounds as referred to in Clauses (2) two and (4) four hereof.

"6. That a fund necessary for the starting of the business in Tasmania shall be raised by the partnership hereby formed, and placed in the hands of the said Gilmore and the said Harrison.

"7. That the said Company reserves the right to dispose of a (1/20) one-twentieth interest in the partnership hereby formed, for the sum of (£250) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

"In witness whereof the said parties hereto have set their hands this 1st day of October 1897.

(Sig.) T. E. COWART.
" J. H. KIRKPATRICK.
" J. A. MAGOON.
By His Att'ys, J. H. KIRKPATRICK,
" T. E. COWART.
DOROTHEA LAMB,
By Her Att'y-, J. H. KIRKPATRICK,
" A. E. POWTER,
By His Att'y, T. E. COWART,
LEMUEL C. ABLES.
" FRANK B. McSTOCKER,
Per His Att'y, L. C. ABLES.
" J. WOLFENDEN.
" T. M. HARRISON.
" A. E. GILMORE."

Signed in the presence of
(Signed) W. C. ROBISON, *N. L.*

The plaintiff alleges that in pursuance of said agreement, on or about January 17, 1898, he left New Zealand and went to the
26 Colony of Tasmania for the purpose of managing and carrying on the business referred to in the agreement and that he did so manage and carry on the same at the city of Hobart in Tasmania from February 1, 1898, to March 1, 1898; that the business was not successful and that he became dissatisfied with its condition and on or about March 10, 1898, notified his partner to that effect; that on or about the last mentioned date, he made demand upon his partners to deliver to him under the terms of paragraph 4 of said agreement, stock of the market value of two thousand pounds in some district other than Tasmania of the field of operations of said partnership; that said demand has not been complied with either in whole or in part; that on or about March 1, 1898, he paid, transferred and delivered to the parties of the first part named in the agreement all funds, moneys and assets of said partnership in his possession, also an account of all disbursements and expenditures made by him for and on account of said partnership, and that said funds, moneys, assets and account were accepted and received by said partners as true and correct; and that at the present time no unsettled account or indebtedness exists between him and his said partners except as to this claim of two thousand pounds with interest and costs.

The second count is upon a judgment for $10,600, which, it is alleged, was recovered June 13, 1899, at the city of Auckland, N. Z., by the plaintiff against the defendants herein together with T. E. Cowart, J. H. Kirkpatrick and George D. Moore in the Supreme Court of New Zealand, Northern District. The other allegations are, that at the time of the said action and of the rendition of the said judgment the said Supreme Court of New Zealand was a court of record in Auckland, having jurisdiction over the parties plaintiff and defendant and also of the subject matter in and for said action; and that no part of the amount of said judgment has ever been paid.

27 To this declaration the defendants demurred on the following grounds:

"1. That there is a defect or non-joinder of parties defendant.

"2. That several causes of action have been improperly united.

"3. That the declaration does not set forth facts sufficient to constitute a cause of action.

"4. That the Court has no jurisdiction of the subject matter set forth in the first count of said declaration, nor does said count allege jurisdictional facts.

"5. That the Court has no jurisdiction of the subject matter set forth in the second count of said declaration nor does said count allege jurisdictional facts.

"6. That the plaintiff has failed to allege the existence in some other District than Tasmania of stock of the market value of Two Thousand pounds (£2000).

"7. That it appears by said complaint that said plaintiff and these defendants are co-partners in respect to the matters and things in

said declaration alleged, and that no action at law will lie between said co-partners for such matters and things.

"8. That the declaration is ambiguous, unintelligible and uncertain, in that it does not set forth the continuance nor the dissolution of the partnership relations created by the memorandum of agreement thereto attached."

The court below sustained the demurrer on several of the grounds named. The case now comes to this Court on exceptions which present the question of the correctness of said ruling and of the merits of the demurrer. Those objections will be considered first which go to *to* the merits of the action itself.

3 and 6. On behalf of the defendants it is contended that the plaintiff is not entitled to recover upon the present declaration inasmuch as he has not therein averred (*a*) that Gilmore has not recovered the 2250£ mentioned in paragraph 4 of the agreement or judgment therefor or that he has not instituted proceedings for such recovery, (*b*) that the stock in said paragraph referred to is or ever was in existence, (*c*) that any tender was made by him to the defendants of the stock held by him in the partnership at the time demand was made for the 2000£ of other stock, and because (*d*) it appears that the promise by the Company in that paragraph mentioned was without consideration and that it is therefore void.

28 (*a.*) The language of paragraph 4 is, in part, that "if * * * that said Gilmore *or* the said Harrison is not satisfied * * * the said Company will give the said Gilmore or the said Harrison stock," and from this it is argued that the remedy here provided for is in the alternative and cannot be taken advantage of by both men, in other words, that *either* Gilmore *or* Harrison may, if dissatisfied, receive the stock for the non-delivery of which the actions is now brought, but that not *both* of them may have such stock because that would be compelling the Company to deliver the same stock twice. This argument, though perhaps not expressed in these precise terms, necessarily involved the taking of the position that, upon dissatisfaction, either Gilmore or Harrison may recover the whole amount of stock, to wit, stock of the market value of 2250£. We believe that the agreement is not capable of this construction. Its language in this respect is clear and unambiguous. The undertaking is, upon the happening of the contingency stated, to "give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (2250£) said Two Thousand Two Hundred and Fifty Pounds mentioned in clause (2) two hereof * * * in exchange for the portion of the said (2250£) Two Thousand Two Hundred and Fifty Pounds taken by him." Clause 2 shows that Gilmore and Harrison together paid 2250£ for a nine twentieths interest in the partnership by the said agreement formed, and Clause 5 further shows that of this sum Harrison paid 2000£ for a two-fifths interest and Gilmore 250£ for a one-twentieth interest. The meaning and intention is clear that *both* Gilmore and Harrison are to have a remedy if they so desire, Gilmore to recover stock of the kind specified of the market value of 250£ and Harrison stock of the said kind of the market value of 2000£ The

remedy of each is independent of that of the other; the measure of recovery in each instance is expressly stated, and even if both become dissatisfied and conclude to exercise their rights, there
29 is no double recovery of the *same* and no double liability on the part of the Company.

(*b*) The defendants contend that it was the intention of the parties that the stock referred to should be delivered to Gilmore or Harrison only in event of its being in existence at the time of demand for it and that their, the defendants', undertaking must be understood to have been upon that condition, in other words, that "the Company" cannot be held to have guaranteed the existence of such stock at such time. The agreement was to deliver stock of the *market* value of 2000£. Had the word "face" been used in place of the word "market," that fact might have lent some strength to defendants' argument. In that case the plaintiff clearly would be taking chances with reference, at least, to the actual value of the stock. We must assume, however, that the words "market value" were used advisedly and with knowledge of the fact that they have a well-known signification and that at times they import something very different in amount from "face value." This language of the contract, in our opinion, discloses an intention on the part of the parties thereto that the plaintiff should, in the event of dissatisfaction, taking no chances at all, not even with reference to value, be reimbursed the amount of his loss—in other words, shows that the defendants, and not the plaintiff, assumed the risk as to the existence of the stock. The agreement under consideration, by reason of its language, is not one of the class to which that in Bowler *v.* Ahlo, 11 Haw. 357, belonged.

It is further urged (*d*) that the Company could not possibly have intended to guarantee the existence of stock of the market value of 2000£ or of any stock at all because there was no consideration for such promise and such an undertaking would therefore be unbusinesslike and improbably. We fail to perceive any force in this argument. So far as appears from the face of the declaration the "Company" contributed nothing to "the partnership hereby formed" other than the right to use in the Colony of Tasmania certain
30 formulas for the cure of alcoholism and narcotism and its proportional share of such small sum as was necessary to defray the expenses of entering upon the proposed business. The plaintiff, on the other hand, paid to "the Company" 2000£ in cash for his interest in "the partnership hereby formed" in addition to paying his share of the expenses just mentioned. In other words, Harrison paid the substantial sum stated in order to be permitted to join in the experiment about to be made of curing alcoholism and narcotism and in the profits, if any, derivable therefrom. That the result of the experiment and the success of the venture were regarded at that time by the parties themselves as highly problematical, is at once apparent from the terms of the agreement, and not only is it not to be wondered at but it is natural to expect that the plaintiff before consenting to put his money in a venture of this sort and to proceed to Tasmania to do the actual work of the part-

nership, should have obtained a stipulation securing to him the return of his money in case of failure and the placing of the parties in their original position. There is no unfairness to the Company in such an agreement if it was voluntarily entered into. The consideration for the promise was ample.

(c) It does not appear that the plaintiff held any certificate or other evidence of his share in "the partnership hereby formed" and the inference is that he did not. There was nothing tangible, then, which he could have tendered. It is averred in the declaration that the plaintiff became dissatisfied with the condition of the business, that he notified his partners to that effect and that he "made demand upon said partners that under the terms of paragraph 4 of said agreement they should deliver to him stock of the market value of Two Thousand Pounds (2000£) in some District other than Tasmania of the field of operations of said partnership." This is a sufficient allegation that the stock demanded was demanded in accordance with the terms of paragraph 4, to wit, in exchange for his intangible interest in "the partnership hereby formed." It
31 is in effect an averment of such a demand accompanied by an offer to give in exchange his intangible interest. Plaintiff did all that by the terms of the contract he was required to do in order to become entitled to the relief demanded.

It is also contended that the agreement, and therefore the declaration, is ambiguous and uncertain inasmuch as it is impossible to ascertain therefrom what stock is meant in Clause 4. Assuming, but not deciding, that the language in this respect is ambiguous, that fact might prove a serious obstacle to the maintenance of a suit for specific performance praying for the delivery of the stock itself; but such is not the nature of this case. The defendants have failed and refused to deliver *any* stock and the action is merely one for the damages resulting from such failure and refusal. Whatever stock was intended, plaintiff would be entitled to at least nominal damages, since the agreement was not, as already held, conditional upon the *existence* of the stock and since, therefore, there was a breach of the agreement.

The further objection is made that there is no allegation in the declaration that the attorneys-in-fact who signed the agreement for some of the defendants were duly authorized so to do. We think that the allegation that the defendants, naming them, entered into the agreement, is sufficient on demurrer.

4, 7 and 8. These grounds of demurrer are based on the fact that the plaintiff, Gilmore and the persons composing "the Company" became, by virtue of the agreement, partners in "the partnership hereby formed." The contention is that the present controversy is one between partners, relating to a partnership transaction, that there has been no final settlement or accounting between the parners, and that under the circumstances the plaintiff's remedy is in equity and not at law. The general rule undoubtedly is that "an action at law will not lie in favor of one or more partners or their repre-
32 sentatives against one or more copartners or their representatives upon a demand growing out of a partnership transac-

tion until there has been a settlement of accounts and a balance struck." 15 Encycl. Pl. & Pr. 1005. There are two reasons for this rule, one, that in an action against a partnership of which the plaintiff is a member, the plaintiff himself would also be a defendant inasmuch as he would recover, if at all, in part from himself or from a fund in which he had an interest, and that this would present a state of affairs as to parties not permitted at law, the other reason "is found in the inherent nature of the partnership relation and consists simply in the fact that prior to an accounting and settlement of the partnership affairs no cause of action exists between the partners founded solely upon partnership dealings, except an equitable action for an accounting and settlement of the affairs of the partnership;" (15 Encycl. pl. & Pr. 1008) in other words, prior to such settlement it cannot be said what, if anything, is due.

Neither of these reasons exist, and therefore the rule itself does not apply, in the case at bar. The plaintiff is not in any sense making himself a party defendant; he is not suing any partnership of which he is a member. The recovery which he seeks is solely from "the Company" or its members and not from "the partnership hereby formed." He has no interest in "the Company" as a member, or in its property (except the enforcement of the present cause of action), although its members are his partners in "the partnership
33 hereby formed." If he recovers judgment against "the Company" or any or all of its members, no property of his or in which he has any interest will become liable for the satisfaction of that judgment.

The allegation concerning an accounting contained in the declaration is really unnecessary. The cause of action is distinct and does not in any way involve a consideration of the partnership accounts or dealings.

We believe the law to be that "where the cause of action is distinct from the partnership accounts, and does not involve their consideration, or require their examination an action at law will lie thereon between the partners;" that "an action of law lies upon express individual and personal contracts between partners, and it is immaterial whether such contracts relate to the partnership affairs or are wholly distinct therefrom," and that "if partners, by an express agreement, separate a distinct matter from the partnership dealings, and one expressly agrees to pay the other a specific sum for that matter assumpsit will lie on that contract although the matter arose from their partnership dealings." (15 Encycl. Pl. & Pr., 1034, 1043, 1044 and 1048). These partners, in order to successfully launch, "the partnership hereby formed," entered into a preliminary contract whereby certain of them agreed to purchase the plaintiff's interest in the concern upon the happening of a certain contingency. The transaction was purely one between the individuals, not in their capacity of partners. Gilmore was not in any way concerned in the agreement as to the purchase of Harrison's interest, and Harrison likewise was in no way concerned in the agreement as to the purchase of Gilmore's interest. It is just as though one only of the partners had agreed to buy out Gilmore for a

specific sum, and another to buy out Harrison for another specific sum.

"If by the articles a continuing partner is, on dissolution,
34 to pay the retiring partner a specified sum, the latter may recover it at law, even though on adjustment of the accounts he would be debtor to the firm." 2 Bates on Partnership, 890. See also *Id.*, 874,889.

"So there may be special bargains between the partners, by which particular transactions are insulated and separated from the winding up; and a single partner be substituted in place of the firm. Such is the common case of a partner retiring and selling out his interest to the continuing partners, who assume the debts. The retiring partner can sue them at law for the purchase price of his interest, which they had agreed to give, or for the amount of any debt he has had to pay." *Ib.*, 891.

"The fact that the partnership affairs have never been adjusted even though an adjustment thereof would show a balance due the defendant from the plaintiff is no impediment to the maintenance of this action. The agreement is for the payment, in a certain contingency, of a specific sum of money by one party to the other in case of a dissolution of the partnership. The party who becomes liable under the contract to pay such money, is the debtor of the other party; and the latter may maintain an action against him therefore, without regard to the partnership relations formerly existing between them or the state of their partnership accounts." Read *v.* Nevitt, 41 Wis. 352, 353. See also Edens *v.* Williams, 36 Ill. 252; Wetherbee *v.* Potter, 99 Mass. 363; Edwards *v.* Remington, 51 Wis. 343.

(5) The allegation of the declaration on this subject is, "that at the time of said action and the rendition of the judgment therein, hereinafer mentioned, the said Court was a Court of Record in said City, having jurisdiction over the parties plaintiff and defendant, and also of the subject matter in and of the said action." This, in our opinion, is sufficient. It is an allegation of facts and not of law. To be sure, it is a brief, summarized statement of the facts, but the evidence showing those facts need not be set out in the dec-
35 laration. The statutes governing the New Zealand Court are merely a part of such evidence and will have to be proved at the trial in the same manner as any other fact. It appears from the face of the declaration that the present defendants were, at the time of the execution of the agreement, and are now residents of Honolulu, although, it also appears, defendant Ables was in Auckland at the date here first mentioned. It is argued that the inference is that all of the present defendants were residents of Honolulu and out of the jurisdiction of the New Zealand court at the time of the institution of the action and the rendition of the judgment, and that therefore the declaration expressly shows that, on the doctrine of Pennoyer *v.* Neff, 95 U. S. 719, the judgment is invalid for lack of jurisdiction by the Court in that action over the persons of those who are defendants in this action. It is unnecessary to decide at this time whether or not the New Zealand court could have acquired jurisdiction over these defendants, if absent, by constructive service by publication, for it may be that they were present, and that direct

service was made or that they voluntarily submitted to the jurisdiction. Such inference, if any, of the nature stated, as may arise out of the other averments of the declaration, is overcome by the positive averment that the New Zealand court did have jurisdiction over the persons of the defendants. Nor do the authorities cited, Galpin *v.* Page, 18 Wall. 350, 367, 368, and Wilbur *v.* Abbott 6 Fed. 814, as we understand them, go to the extent of holding to the contrary. The decision in Galpin *v.* Page was as to the validity and effect of certain decree introduced in evidence and collaterally attacked in a subsequent proceeding, and was not on demurrer. The Court there said: "The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law. * * *

36 "The tribunals of one State have no jurisdiction over the persons of other States unless found within their territorial limits, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy. * * *

"Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree." The presumptions referred to are those which have been held to arise from a record of a court of superior jurisdiction which is silent as to the matters concerning its jurisdiction in the particular case. These quotations may be more in point at the trial after the record of the New Zealand court is proven in evidence. The language used recognizes the possibility already herein pointed out of a court acquiring jurisdiction over the persons of non-residents. The plaintiff in the declaration in the case at bar is not relying on presumptions but on an express allegation.

The report of the case of Wilbur *v.* Abbott, *supra,* does not expressly state whether or not the declaration contained any allegation on the subject of the jurisdiction of the court which rendered the judgment declared on, but the strong inference is that there was no such allegation. The decision holds that, it appearing that the judgment debtors resided out of the State when the judgment was rendered, "no presumption can arise that they were duly served with notice of the suit in which the judgment was rendered or that they appeared and answered thereto." The case is distinguishable from that at bar in the particular already pointed out, and the decision does not apply.

37 The citation from 2 Black on judgments, 875, makes clearer the distinction sought to be drawn between the case last referred to and that at bar. The plaintiff in Wilbur *v.* Abbott in framing his declaration, evidently relied on the rule stated by Black that, "in bringing suit on a judgment rendered by a court of

record in another State, it is not necessary for the plaintiff to aver that the court had jurisdiction either of the person or subject matter, or to set out the facts conferring jurisdiction; for jurisdiction is presumed to have existed until the contrary is clearly shown by way of defense to the action. It is proper, however, and perhaps necessary to allege that the court rendering the judgment was one of general jurisdiction, or a court of record, or to describe it in such terms that this fact may appear as a necessary inference." The court practically took the view that such a presumption was insufficient to sustain the pleading where it affirmatively appeared on its face that the defendants were non-residents; and Black in the same section says: "if, however, it should appear from the record that the judgment was against a non-resident, it seems that an exception must be made to the general rule." The plaintiff before us has recognized this exception, or, perhaps, that equally favorable presumptions, in pleading, do not attend the judgment of a foreign court as attend that of a court of a sister State, and has accordingly made an express allegation to avoid the difficulty.

Two decisions which, though arising out of the interpretation of particular statutes, are valuable for the light which they throw on the question of the sufficiency of such an allegation as that contained in this plaintiff's declaration, are those in the cases of Brownell *v.* The Town of Greenwich, 114 N. Y. 518, 527, and Fisher, Brown & Co. *v.* Fielding 67 Conn. 91, 102, 103. In the first of these, a case submitted under the Code, the agreed statement was that the county judge "duly adjudged, determined and ordered" to a certain
38 effect in certain proceedings, and counsel contended, as in the case at bar, that the facts giving the jurisdiction must be alleged and proven. The Court said: "The expression 'duly adjudged,' as used in the statement for the submission of this controversy, therefore, means adjudged according to law, that is, according to the statute governing the subject, and implies the existence of every fact essential to perfect regularity of procedure, and to confer jurisdiction both of the subject-matter and of the parties affected by the judgment, including the defendant. A judicial officer has jurisdiction, when he has power to inquire into the facts, to apply the law and to pronounce the judgment. Any step in the cause or proceeding before him is necessarily the exercise of jurisdiction, and that step cannot be 'duly' taken unless jurisdiction exists. The final step, in particular, the making of the judgment, cannot be 'duly' taken unless all of the preliminary steps upon which it is based have likewise been duly taken."

Fisher, Brown & Co. *v.* Fielding, *supra,* was an action brought in Connecticut on a judgment obtained in England. The plaintiff simply averred that the foreign court "duly adjudged" that the defendant should pay to the plaintiffs, etc. Defendant demurred for want of allegations that the court in question had jurisdiction of the alleged action, or of the subject matter, or of the parties; or that the defendant had notice of the action, or was summoned to appear therein, or did in fact appear; or that there was any hearing or trial. On appeal, the Supreme Court of Connecticut said:

"The plaintiffs' complaint was drawn in the form authorized by

the Practice Book (No. 169, p. 107) in actions on a foreign judgment. In actions on a domestic judgment, the authorized forms (Practice Book, No. 166 and No. 167, pp. 106, 107) state the fact, but not the manner of its recovery; but in declaring on the judgment of a foreign court, the approved averment is that such court, in an action therein pending between the plaintiffs and the defendant, duly adjudged that the defendant should pay to the plaintiffs the sum in question. No court can 'duly' adjudge such a payment, except in an action conducted in due course of law. Due course or process of law, with respect to such a judicial proceeding, necessarily involves reasonable notice to the defendant of the institution
39 and nature of the action, given (unless this be waived), if he be a non-resident, by personal service within the jurisdiction, and a fair opportunity to be heard before a tribunal of competent jurisdiction. So much is due to every person from whom another seeks to recover in a judicial controversy before a court of justice. Pennoyer *v.* Neff, 95 U. S. 714, 733.

"In the case of a domestic judgment, it is unnecessary to allege that these conditions have been fulfilled, because our law requires it, and it is to be presumed that the law has been obeyed. In respect to a foreign judgment, nothing can safely be taken for granted, and the Practice Book has therefore provided a different form of complaint.

"The Practice Act was designed to simplify our legal procedure, and to abbreviate pleadings by the omission of all unnecessary allegations. The demurrer to the complaint, on the ground that it did not allege that the High Court of Justice, Queen's Bench Division, Birmingham District Registry, had jurisdiction of the action, or of the parties, or of the subject-matter, nor that the defendant had notice of its pendency, or was summoned to appear, was therefore properly overruled. These facts were the indispensable conditions of a due adjudication by the foreign court; and whatever is necessarily implied is sufficiently pleaded. Nor was it cause of demurrer that the complaint did not state that any hearing or trial was had. The averment as to a due adjudication implied that there was a fair opportunity for hearing; and that the defendant could not complain that he did not avail himself of it."

See also Wakelee *v.* Davis, 50 Fed. 522, 523, (1892) where, expressly referring to Galpin *v.* Page (1873) and Wilbur *v.* Abbott (1880) and following Brownell *v.* Greenwich, it was said: "But in the eleventh and twenty-third paragraphs the plaintiff alleges that said judgment was duly given, made and entered by said District court which, inasmuch as the defendant was shown to be a non-resident, was a proper and apparently necessary averment. * * * The averment that the judgment was duly entered was a sufficient statement of the facts, under the New York practice, to impliedly allege jurisdiction * * * The denial by the defendant of this allegation raises an issue of fact in regard to the existence of jurisdictional facts."

The plaintiff in the case at bar alleges with far more directness the matters which the court in the New York and Connecticut cases held

to have been averred by necessary implication in the expression "duly adjudged."

One other argument advanced against the second count, is that the cause of action in the New Zealand court was joint and not joint and several, that only a joint judgment against all the defendants
40 before that tribunal could have been correctly rendered, and that the judgment, inasmuch as it was not against all of the defendants jointly, is void upon its face. This, if erroneous at all, was a mere irregularity and not matter affecting the jurisdiction of the court, and therefore not now open to review.

2. It does not appear from the face of the declaration that the judgment of the New Zealand court was based upon the same original cause of action which is stated in the first count herein. Assuming that judgment arose out of an entirely distinct transaction between the parties and that therefore the present declaration sets out beyond any question two causes of action, the second ground of demurrer cannot be sustained. Section 1259 of the Civil Laws of 1897 provides; "The plaintiff in a civil suit may unite several causes of action in the same complaint, when they all arise out of: 1. contracts, express or implied; or " * * * (six other classes of actions are here named). "But the causes of action so united shall all belong to one only of these classes, and shall affect all the parties to the action, and shall be separately stated." In our opinion an action on a judgment is, within the meaning of this statute, an action *ex contractu, i. e.,* on the promise or contract implied by law to pay the amount of the judgment 1 Encycl. Pl. & Prac. 193; 1 Chitty Cont. 23; 1 Parsons Cont. 7; 2 Bl. Com. 465; Freeman on Judgments (3rd Edition), 217; 2 Black on Judgments, 848; Johnson *v.* Butler, 2 Ia. 535; Moore *v.* Nowell, 94 N. C. 270, 271; Stuart *v.* Lander, 16 Cal. 373, 375; Childs *v.* The Harris M'f'g Co., 68 Wis. 232, 233. The first count is on an express contract, hence there is no misjoinder.

Defendants contend, however, that it sufficiently appears by inference from the averments of the declaration, and the plaintiff during the argument in this court stated the fact to be, that the New Zealand judgment was rendered on the same cause of action now declared on in the first count. Even upon these facts the two counts
41 have not been properly joined. The plaintiff has simply stated his case in two different forms, and for the same reasons, no doubt, which ordinarily leads plaintiffs to allege two or more different counts describing the cause of action, *e. g.,* because of uncertainty as to whether or not one or the other of the counts is capable of proof. He can, of course, and expects to recover on one only. The tendency of courts at present is to regard the judgments of foreign courts of record as being just as conclusive between the parties as those of domestic courts of record, and there seems to be, in this view, no good reason for holding that the original cause is not merged in a foreign judgment while holding that there is such merger in the case of a domestic judgment. In neither instance, it scarcely need be noted, would there be any merger if the judgment was for any reason void, as, for example, for lack of jurisdiction in the court rendering the same, for such an alleged judgment would in

fact not be a judgment at all. While, therefore, it may appear to be inconsistent for the plaintiff to aver both the agreement and the judgment, that consideration alone will not prevent the joinder of the counts. At common law inconsistent counts could be joined, and it is only by statute in some states that the procedure is prohibited. It is not uncommon to find in the same declaration two or more counts which are, strictly speaking, inconsistent and which cannot all be true at the same time; but the practice is well established and is, moreover, founded on good reasons. In the case at bar, if plaintiff fails to prove the jurisdiction of the New Zealand court, the position will be that the original cause of action will stand intact for lack of a valid judgment to absorb it; on the other hand, if he does prove the former judgment to be valid and binding against these defendants,
he will recover on that and the original cause will be deemed
42 merged. The apparent inconsistency will have disappeared.

It would serve no good purpose to compel the plaintiff to bring an action first on the judgment and then, if that fails of proof, to bring a new action on the agreement. It is no hardship to the defendants to have both phases of the controversy disposed of in one action and it will further the ends of justice to permit this course to be followed.

See 5 Encycl. Pl. & Pr. 319, 321; Barton *v.* Gray, 48 Mich. 166, 167; Walsh *v.* Kattenburgh, 8 Minn. 101, 102; Snyder *v.* Snyder, 25 Ind. 401, 402.

(1) Non-joinder of parties defendant. Four or five persons other than those named as defendants in this action, were members of "the Company" and parties of the first part to the agreement sued on in the first count. The judgment declared on in the second count was rendered against three persons other than the present defendants. Is there a defect of parties defendant?

The agreement sued on (quoting from it) "witnesseth: for and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated;" and then goes on to specify the details of the contract. As we construe this clause, it is in effect as though the language used had been, that for the consideration stated "the parties of the first part do hereby, jointly and severally, make, with the parties of the second part, the following agreement of partnership." The contract made in the opening clause by the parties of the first part is joint and several, and the contract there made is that the details of which are specified in the succeeding clauses. If paragraph 4 stood entirely by itself, it would probably be construed to mean that the members of "the company" jointly were liable for the promises there set forth
43 to give Harrison certain stock upon the happening of a certain contingency. The paragraph, however, cannot, we think, be read by itself; it must be read in connection with the opening sentence above quoted, and if so understood the result is the finding that the promise in question was a joint and several obligation on the

part of the members of the company. This is the construction strongly contended for by the plaintiff himself.

Turning to our statutes, Section 1222 of the Civil Laws of 1897 provides: "It shall be necessary to join as defendants in a civil action *all* the joint and several, or joint makers of promissory notes, or drawers of drafts, bills of exchange or orders, or *joint* and *several* obligors, lessees, or *parties of the first* or second *part* to covenants, agreements and contracts, in suing for non-payment, non-acceptance, or non-fulfillment thereof, but it shall in no case be necessary to serve all the joint parties sued with process. Service of process upon one of several defendants at law, shall be legal service upon all for the purpose of appearance in court, and judgment may be entered against all such co-defendants thereon; provided, however, that no execution shall issue against the sole property of any joint defendant on whom process was not duly served as aforesaid." Clearly the express language of this statute renders it necessary for the plaintiff to join as defendants all of the parties of the first part to the agreement sued on in the first count. It is, however, contended that the statute must be read as subject to an implied exception in the case of parties out of the jurisdiction of the court, on the ground that the statute is only declaratory of the common law rule on the subject and that at common law the exception named existed. If the exception referred to existed at common law,—it is unnecessary to say whether it did or not—and if the statutory provision is to be construed as subject to the same exception, it can only be on the theory that the Legislature therein intended merely to declare the common law on the subject without modification. That this was not the intention of the
44 Legislature, however, is clear from the fact that under the terms of the statute a plaintiff may recover a judgment against all those jointly liable on a contract without having service made upon all of said partners who are resident within the jurisdiction. The latter certainly was not possible at common law. We know of no sufficient reason for declaring the statute subject to the exception contended for.

Judgment debtors are not within any of the classes named in section 1222. They are not "Parties of the first or second part * * * agreements or contracts," that language referring, we think, solely to those who have voluntarily entered into such agreements and not to those upon whom, though unwilling, the law casts an obligation to pay the amount of a judgment duly rendered against them. The requirements of that section, then, as to joinder of all the parties, do not affect this branch of the case. It is the common law rule that applies. At common law, in an action on a judgment, it was necessary to join as parties all the living judgment debtors excepting only those out of the jurisdiction, *U. S. v. Cushman,* 2 Sumner 313, 314; *Gilman v. Rives,* 10 Peters 298, 299, 300; 11 Encycl. Pl. & Pr. 1119, 1120. Any expression to the contrary in *Bowler v. McIntyre,* 9 Haw. 306, was *obiter dictum.* The common law rule, subject to the exception stated, governs in this case. The plaintiff must make all the judgment debtors parties defendant or show an excuse for not doing so.

The New Zealand judgment having been recovered against seven only of the parties of the first part to the agreement, the foregoing decision will, in view of the provision of section 1259 that "the cause of action so united shall * * * affect all the parties to the action" render it impossible, we think, for the plaintiff to join the two counts in one action.

In our opinion, the demurrer was properly sustained upon
45 the first ground, but not upon the other grounds. Accordingly the exceptions are overruled and the case is remanded to the Circuit Court of the First Judicial Circuit for such further proceedings as may be proper not inconsistent with the foregoing views.

(Sg.) W. F. FREAR.
" C. A. GALBRAITH.
" A. PERRY.

ROBERTSON & WILDER,
For the Plaintiff, who also Appeared in Person.
MAGOON & THOMPSON,
KINNEY, BALLOU & McCLANAHAN, AND
H. A. BIGELOW,
For the Defendants.

46 In the Circuit Court of the First Circuit, Territory of Hawaii, February Term, 1900.

THOMAS MILNER HARRISON
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, DOROTHEA EMERSON (née LAMB), T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEO. D. MOORE.

Assumpsit.

Amended Declaration.

To the Hon. A. S. Humphreys, First Judge of the Circuit Court of the First Circuit:

The undersigned, Thomas Milner Harrison, a foreigner by birth, plaintiff herein, claims of J. A. Magoon, F. B. McStocker, L. C. Ables, Dorothea Emerson (*née* Lamb), also foreigners by birth, residing in the Territory of Hawaii, and T. E. Cowart, J. H. Kirkpatrick, A. E. Powter, J. Wolfenden and Geo. D. Moore, non-residents of said Territory, defendants herein, the sum of ten thousand ($10,000) dollars with legal interest from March 10th, 1898, for damages resulting to him for injury done by said defendants, and for cause of action alleges:

That prior to and on the 20th day of September, A. D. 1897, the said defendants were carrying on business as copartners in the Colony of New Zealand and elsewhere under the firm name or style of The African Pacific and Indian Hagey Company.

That on the date last above mentioned, at Auckland, New
47 Zealand aforesaid, the said defendants entered into an agreement with the said plaintiff and one Alfred Edward Gilmore, a copy whereof is hereto attached and made a part hereof, whereby it was agreed that the colony of Tasmania should be the place or sphere of business under said agreement, and that the plaintiff should go to the said Colony and manage the business there.

That by paragraph 4 of said agreement it was provided that if at or before the expiration of six months from the departure of the plaintiff from New Zealand to Tasmania the plaintiff should be dissatisfied with the condition of the said business in Tasmania the defendants would give the plaintiff stock of the market value of an amount equal to the sum paid by plaintiff as a consideration under said agreement, that is to say, stock of the market value of Two Thousand Pounds (£2,000), in some district other than Tasmania of the field of operations of said partnership.

That in pursuance with said agreement, the plaintiff on or about January 17th, 1898, left New Zealand and went to Tasmania aforesaid for the purpose of managing and carrying on the said business and that he did so manage and carry on the same at the City of Hobart in Tasmania from the first day of February, 1898, to the first day of March, 1898.

That the business was not successful and the plaintiff became dissatisfied with its condition and so, on or about the tenth day of March, 1898, he notified the said defendants to that effect.

That on or about the said tenth day of March, 1898, plaintiff made demand upon said defendants that under the terms of paragraph 4 of said agreement, they should deliver to him stock of the market value of Two Thousand Pounds (£2,000) in some District other than Tasmania of the field of operations of said partnership.

That said defendants neglected and refused and still neglect and refuse to deliver said stock or any part thereof or the value thereof to the plaintiff.

48 Whereof plaintiff prays judgment against the defendants herein for said sum of Ten Thousand ($10,000) Dollars with interest as aforesaid and costs; and asks the process of this Court to cite the said defendants to appear and answer this complaint before a jury of the country at the August, 1901, Term of this Court unless otherwise sooner disposed of by judicial authority.

Dated May 20th, 1901.

THOMAS M. HARRISON,
(Sg.) By His Attorneys, ROBERTSON & WILDER.

(Sg.) ROBERTSON & WILDER,
Attorneys for Plaintiff.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

Personally appeared A. G. M. Robertson, who, being duly sworn, on oath deposes and says that the matters and things stated in the foregoing declaration are true to the best of his knowledge and belief.

Subscribed and sworn to before me his 20th day of May, A. D. 1901.

(Sg.) A. G. M. ROBERTSON.
(Sg.) J. A. THOMPSON,
Clerk First Judicial Circuit.

49 [N. Z. Stamp 11 1/10/97 T. M. H.]

Memorandum of Agreement.

Memorandum of Agreement made this 20th day of September 1897, between the African Pacific and Indian Hagey Company, an association of partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, the said partnership being composed of the following members:—T. E. Cowert, J. H. Kirkpatrick, and Geo. D. Moore, of the State of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore, and Thomas Milner Harrison, both of the City of Auckland in the Colony of New Zealand, parties of the second part.

Whereas the said Company have the exclusive right title to the Hagey formulas for Alcoholism and Narcotism in and for the Colony of Tasmania and whereas the said Company have by contract entered the — day of May 1897 with James Wolfenden secured certain rights relative to the use of the Thompson formulas for said diseases and whereas the said parties hereto propose to enter into partnership for the purpose of using, administering and vending to others the right to use and administer the said remedies in the Colony of Tasmania and in no other place or places.

Now These Presents Witness*eth:*

For and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated.

1. That the capital of the said partnership shall be (£5000) five thousand pounds, of which the said Company shall own
50 (11/20) eleven-twentieths in consideration of granting all their exclusive rights to use said remedies in the said Colony to the said partnership hereby formed; and the said Company will supply the said partnership hereby formed with the said remedies at the cost price thereof, until such time as the formulas for the preparation of the same may be given the said partnership hereby formed; the said Company will not use the said remedies in the said Colony during the existence of the said partnership hereby formed otherwise than as partners therein; and they hereby convey to the said partner-

ship hereby formed all their rights, privileges and recourses against others than the said partnership using the said remedy in the said Colony.

2. That the said Gilmore and the said Harrison have paid the sum of (£2250) two thousand two hundred and fifty pounds to the said company for the other (9/20) nine-twentieths interest in the said partnership hereby formed, the receipt whereof is hereby acknowledged.

3. That the said Gilmore and the said Harrison shall conduct the business of the said partnership in Tasmania each at a salary of (£40) forty pounds per month to be a first charge on the receipts of the business after the current expenses have been paid. The said Harrison to act as manager of the said partnership hereby formed and the said Gilmore to act as Secretary Treasurer thereof.

4. That if at or before the expiration of a period of six months from the date of the departure of the said Gilmore or the said Harrison from New Zealand to Tasmania, the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (£2250) said two thousand two hundred and fifty pounds mentioned in Clause (2) two hereof in some
51 other district of the Companies field of operation in exchange for the portion of the said (£2250) two thousand two hundred and fifty pounds taken by him, and the said Company reserve the right either at the suggestion of the partners in Tasmania, or at their own suggestion to send one of their own number or some competent man to aid and assist the partners in Tasmania at the same salary and with the same powers as either the said Harrison or the said Gilmore.

5. That the respective interests of the said Harrison and the said Gilmore in the partnership business in Tasmania are as follows, the said Harrison to have a (2/5) two-fifths interest for which he has paid (£2000) two thousand pounds as mentioned in Clause (2) two hereof and referred to in Clause (4) four hereof, and the said Gilmore a (1/20) one-twentieth interest in the said partnership for which he has paid (£250) two hundred and fifty pounds as referred to in Clauses (2) two and (4) four hereof.

6. That a fund necessary for the starting of the business in Tasmania shall be raised by the partnership hereby formed, and placed in the hands of the said Gilmore and the said Harrison.

7. That the said Company reserves the right to dispose of a (1/20) one-twentieth interest in the partnership hereby formed, for the sum of (£250) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

In Witness Whereof the said parties hereto have set their hands this 1st day of October 1897.

(Sig.) T. E. COWART.
J. H. KIRKPATRICK.
J. A. MAGOON,
By His Att'ys, J. H. KIRKPATRICK,
T. E. COWERT.
DOROTHEA LAMB,
By Her Att'ys, J. H. KIRKPATRICK,
T. E. COWERT.
A. E. POWTER,
By His Att'y, T. E. COWERT,
LEMUEL C. ABLES.
FRANK B. McSTOCKER,
Per His Att'y, L. C. ABLES.
J. WOLFENDEN.
T. M. HARRISON.
A. E. GILMORE.

Signed in the presence of
W. C. ROBISON, *N. L.*

Endorsed and Filed May 20, 1901.

52 Title of Court and Cause.

Answer to Amended Declaration.

Now comes the defendants, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothy Emerson (*née* Lamb), some of the defendants in the above entitled cause, by their attorneys Kinney, Ballou & McClanahan and Magoon and Thompson, and deny each and every allegation in the plaintiff's amended declaration contained.

Dated Honolulu, June 8, A. D. 1901.

(Sig.) KINNEY, BALLOU & McCLANAHAN.
(Sig.) MAGOON & THOMPSON.

Endorsed and Filed, June 8, 1901.

53 Title of Court and Cause.

Motion to Amend Answer.

Now comes J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Emerson, *née* Lamb, defendants in the above entitled cause, by their attorneys Kinney, Ballou & McClanahan, and move that they may be allowed to amend their answer in the above entitled cause by adding the following words at the foot thereof:

"And these defendants give notice that they intend to rely upon the defenses of fraud, illegality, release and payment."

J. A. MAGOON,
F. B. McSTOCKER,
L. C. ABLES, AND
DOROTHEA EMERSON (NÉE LAMB),
By Their Attorneys,
(Sig.) KINNEY, BALLOU & McCLANAHAN.

Endorsed and Filed Aug. 16, 1901.

54 In the Circuit Court of the First Circuit, Territory of Hawaii.

THOMAS MILNER HARRISON
vs.
J. A. MAGOON ET ALS.

Transcript of Testimony.

	Di.	Cr.	Red.	Rec.	Recal.
Ables, L. C.....	1	48	72	79	98
Emerson, Mrs. D.....	79	88	94	97	
Harrison, T. M.....	105	128	181	183	

(The numbers enclosed in brackets thus ( ) are the numbers showing the bottom of the respective pages of the original Transcript of Evidence.)

55 In the Circuit Court of the First Circuit, Territory of Hawaii.

THOMAS MILNER HARRISON
vs.
J. A. MAGOON ET ALS.

THURSDAY, *October* 29, 1903.

Testimony of L. C. Ables, Called for Plaintiff, Sworn.

Mr. ROBERTSON:

Q. Mr. Ables, in 1897, did you form a partnership in connection with the Hagey business with Mr. Magoon and others?
A. Yes, sir.
Q. Did you have written articles of association?
A. Yes.
Q. Have you an original copy of those articles?
A. I have not, no.
Q. Do you know whether there is any original copy in existence?
A. Here in Court I believe.
Q. What is that?
A. They were in Court before. I presume they are here now.
Q. And you had a copy. I will ask you to examine this document and see whether it is a copy of the articles of co-partnership of the African Indian and Pacific Hagey Co.
A. I think that is a copy.

Mr. ROBERTSON: I offer this in evidence.

Mr. MCCLANAHAN: We raise no objection because it is a copy; we object to it as incompetent, irrelevant and immaterial on the ground that George D. Moore, one of the alleged partners,
56 did not sign, therefore he was not in the partnership.

Mr. ROBERTSON: I submit that does not affect the status of the parties who did sign.

We offer to show, that, nothwithstanding that Moore did not sign as a matter of fact he paid his proportion of the capital in the Company and took part in the Company and operated with the other members as a corpartner with them, so that the mere failure to sign the Articles with them does not affect the Articles at all. As to those that did sign to become partners and operate under those Articles that they have signed, they certainly cannot say they were not partners. In addition to this, as I said, we propose to show that Moore put up his share of the capital and became a full-fledged partner in the concern, although he did not actually sign the Articles. This will be evidence of the objects of the copartnership.

Mr. McCLANAHAN: If the offer is made to show a ratification and participation in this partnership by Mr. Moore, and a ratification of these Articles, well and good, otherwise we want them stricken from the record if a ratification is not shown.

The COURT: That is your promise, as I understand it, Mr. Robertson.

Mr. ROBERTSON: Well we contend, contributing his share of the capital and participating in the business, naturally makes a ratification of the articles.

The COURT: With that promise the objection will be overruled. It may be received in evidence and marked Plaintiff's Exhibit "A."

Mr. MAGOON: Exception.

57 (Read in evidence:)

Mr. ROBERTSON:

Q. Do you know whether or not the partnership agreement there was signed upon the date mentioned, the 10th of April, 1897?

A. I cannot be positive of the date.

Q. It was about that date, was it?

A. About that time.

Q. You know where George D. Moore was at the time the Articles were signed?

A. He was in Auckland, New Zealand I was informed.

Q. Did you proceed to New Zealand?

A. Yes, sir.

Q. How long after the partnership was formed here in Honolulu?

A. I think the same day the papers were signed, or the following day.

Q. Did you meet George D. Moore in Auckland?

A. I did, he met us on the wharf.

Q. What if anything was done under and pursuant to these Articles of Copartnership?

A. We went to New Zealand—to Auckland, New Zealand, and started an institute, what was known as an institute.

Q. What position did you hold in the partnership?

A. I was secretary and treasurer.

Q. Did you keep the books?

A. Kept the books.

Q. Do you know whether or not George D. Moore contributed his proportion to the capital under this agreement?

A. The capital, I don't know, he was reported to have done so.

Mr. McCLANAHAN: I ask that that be striken out what he purported to have done.

58 The COURT: It may be stricken out.

Mr. ROBERTSON:

Q. Don't you know of your own knowledge whether he actually contributed the amount of $2062?

A. No, I don't. I know it is credited to him as his proportion on the books.

Q. He was credited with that proportion on the books?

A. The books show that. Whether it was given to him or whether he got it, I don't know.

Q. Well, you noticed that one clause of the partnership agreement here provided for the raising of a fund to start the business going?

A. Yes.

Q. You know whether or not George D. Moore contributed to the fund?

A. I know that he did.

The COURT:

Q. Well, you kept those books, Mr. Ables?

A. Yes, sir.

Q. By whose authority or under whose direction did you credit to Mr. George D. Moore the $2062, the amount that he subscribed under the Partnership Agreement?

A. If you notice it, the Articles, the stock is divided in this way. It would be the same as a man in the sugar plantation, if I were secretary and treasurer, I would be handling the stock books of these holders, but I wouldn't know who got these shares which would be——

Mr. ROBERTSON:

Q. How much was raised of this fund to start the business?

A. Without referring to my book, I cannot give the exact amount, but I think when it is converted into English money that it amounted to 512 pounds, something over $1020,—512 Pounds, something as it is in the book.

59 Q. To which George D. Moore contributed his proportion?

A. Yes, sir.

Q. Can you state whether or not George D. Moore received any share of the dividends or profits of the partnership that were divided among the partners?

A. It was receipted for, I don't think by him individually, I think by Mr. Cowert or Kirkpatrick.

Mr. McCLANAHAN: I object to that as irresponsive to the question and ask that it be stricken out.

The COURT: The motion to strike out is granted. Let the answer be stricken out.

Mr. McCLANAHAN: Exception.

Q. Where was George D. Moore at the time when division of any profits was made?

A. I am not positive but I think that it was during the—A dividend was paid during his absence from the Colonies when—at the time that he took a trip back to Texas, through Honolulu.

Q. And who represented him at Auckland?

A. His dividend was receipted if my—to the best of my memory by either Mr. Cowert or Mr. Kirkpatrick, I wouldn't say who; I have a copy of it in my book.

Mr. McCLANAHAN: I ask that that be stricken out as irresponsive to the question.

Mr. ROBERTSON:

Q. What book do you refer to?

The COURT: Just a moment. The motion is granted that the answer be stricken out.

Mr. ROBERTSON: Exception.

Q. What book do you refer to Mr. Ables?

A. Before I left there—before I turned over my books to
60 my successor, I had a copy made of all transactions of financial nature where I had received and paid moneys, more to keep for my own protection, a good thing to do, I had a copy, I had it certified to by an expert accountant as an exact copy and also had it certified before the American Consul Mr. K. He went over the figures with me, and at my request certified that it was an exact copy of the books.

Q. Without referring to that book Mr. Ables can you state who represented Mr. Moore at Auckland while he was absent?

A. I had no notification or any knowledge from any one only a power of attorney; I don't think that they did, but Mr. Cowert or Mr. Kirkpatrick, one or the other, receipted for his dividend.

Mr. McCLANAHAN: I ask that be stricken out as incompetent, irrelevant and immaterial and not responsive to the question, the portion about Mr. Cowert receipting for the dividend.

The COURT: That portion of the answer following the words "I don't think that they did" may be stricken out.

Mr. ROBERTSON: Save an exception.

Q. Irrespective of any written power of attorney was there any verbal understanding as to who was to represent Moore in his absence?

A. Not that I know of.

Q. Do you know by what authority you paid his dividend to Cowert or Kirkpatrick?

A. I know the circumstances under which it was done, how it was done.

Q. Will you state those circumstances?

A. As a matter of fact Mr. Cowert received this money or a portion if this money that was dividends; I mean he held the money

and stated to me that he had a draft for Mr. Moore, and
61 would receipt for his money, either Mr. Cowert or Mr. Kirkpatrick.

Q. He had what from Mr. Moore?

A. Either one, a receipt for his dividend, stated to me that they would send the money to him.

Mr. McClanahan: I ask that the statement of either Cowert or Kirkpatrick be stricken out as hearsay.

The Court: It is so ordered.

Mr. Robertson: Exception.

Q. Well, did either one or the other purport to have authority to receipt for Moore's dividend?

A. I don't think I questioned the authority, I considered I held the receipt of either one of them and held their receipt for money, and didn't question their authority.

Mr. McClanahan: I object to what the witness considered as an authority. And ask that it be stricken out.

The Court: It is so ordered.

Mr. Robertson: Exception.

The Court:

Q. The question propounded to you, Mr. Ables, was whether you knew either of these gentlemen, whom you have mentioned, had authority to represent George D. Moore?

A. I didn't know it.

Mr. Robertson:

Q. Will there be anything in this book of yours that might refresh your memory on that point?

A. That book will tell me whether it was Mr. Cowert or Mr. Kirkpatrick that receipted for the money, which of the two.

Q. Would it refresh your memory as to how or by what authority they receipted for it?

A. No, I dont' depend on memory I depend on the signature.

Q. Depend on what?

62 A. Depend upon a copy of the receipt to know which one it was that receipted for it.

Q. Would that receipt show in what capacity the party signing was acting?

A. It is signed George D. Moore either by Mr. Cowart or Mr. Kirkpatrick.

Mr. McClanahan: I object to that and ask that it be stricken out. The receipt speaks for itself. There is no showing of any such receipt.

The Court: The motion is granted, the answer will be stricken out.

Mr. Robertson:

Q. Where is that?

A. I could not tell. It was in Court here yesterday, I think. It was left here from the previous trial.

Q. What kind of a book is it?
A. It is a thin memorandum book, something like a note book, thinner than that on your Honor's desk.
Q. Is this the book you refer to Mr. Ables?
A. It is.
Q. Do you find anything in there that will refresh your memory on these matters?
A. It doesn't refresh my memory, only it tells me who signed it, which one of the two, for Mr. Moore.
Q. I don't catch that answer?
A. It tells who signed form Mr. Moore. I said before in my answer that I didn't know whether it was Mr. Cowert or Kirkpatrick. I can tell you now.
Q. Do you know now?
A. It was Mr. Cowert.

Mr. McClanahan: I object to that as immaterial and ask that it be stricken out, there having been shown no agency between Moore and Cowert.

63 Objection overruled.
Exception.

Mr. Robertson:

Q. Was that on the books of the Company you know that Mr. Cowert was treated as a copartner.

Objected to as immaterial.

Mr. Robertson:

Q. State whether or not Mr. Moore knew that he was treated as a copartner on the books of the African Pacific & Indian Hagey Company?

Objected to as incompetent, irrelevant and immaterial.
Objection overruled.
Exception.

A. He received his share of the dividend.

Mr. McClanahan:

Q. What is that?
A. I say he was credited his share of the dividend and it was receipted for in the manner I have described.

Mr. McClanahan: I object to the answer and ask that it be stricken out as irresponsive to the question.
The Court: It is so ordered.

Mr. Robertson:

Q. Do you know whether or not George D. Moore ever saw the copartnership books?
A. The books that I kept, yes; I know that he did and had access to them.

Q. Did he know that his name was entered on those books as a partner?

A. Yes, sir, he could not have helped but have known that?

Q. Did he purport to be a partner in this copartnership?

A. Yes sir.

Q. Did he take any part in the copartnership affairs?

A. Not a very active part.

64 Q. Well, did he take any part?

A. He didn't do any work.

Q. What did he do?

A. Well he visited the Institute, associated himself with the patients at the Institute.

Q. Did he consult with the other partners as to the business of the concern from time to time?

A. Tried to.

Q. And hold himself out as a partner in the business?

A. Yes.

Q. He tried to, Mr. Ables, how did he try to?

A. Well, I would have to enter into a sort of explanation to explain that to your Honor. I will do it if you say so.

The COURT: I think you should make any explanation of that statement in order that the Jury may be fully advised as to what you consider he tried to do in connection with this copartnership.

A. Well, I will make a statement if your Honor desires it. Well, Mr. Cowert and Mr. Kirkpatrick, as we discovered after our association with them, were very peculiar men. They were men who took things in their own hands. They had the control of the stock, and they carried on the business notwithstanding Moore and myself protested against their methods, etc. They had the balance of power, That is the reason I made the statement that Mr. Moore tried to, as I did. We tried to advise with them about their manangement, but Mr. Cowart and Mr. Kirkpatrick took the matter in their own hands, and they made life very unbearable for both of us, particularly myself. That is what I mean by saying "we tried."

Q. Mr. Moore then participated in the management of the copartnership as much as any of the other copartners outside of Cowart and Kirkpatrick, is that correct?

65 A. No, he didn't have as active a part as either myself or Dr. Wolvington. Col. Moore was an old man, a man nearly 70 years old, and he was not a business man. I had the bookkeeping to do, and I had a good deal of work to do, while he did not. But Mr. Cowert and Mr. Kirkpatrick took matters in their own hands, and we were trying to be a balance power to them, and that is the fact of the matter, tried to hold them down; they were trying all the time to get rid of us, shake us, give us the shake.

Mr. ROBERTSON:

Q. Did Cowert and Kirkpatrick decline to follow advice given them in partnership matters by Moore?

A. They absolutely did just as they would have done if Col. Moore and I had not been there.

Q. Notwithstanding you tried to advise them, they would not listen to your advice, is that it?

A. We entered a protest and got ourselves into bad odor with them, simply that we were trying to fight them, that is, oppose their methods of doing business.

Q. State whether or not you held a power of attorney from F. B. McStocker in connection with this partnership business?

A. I held a power of attorney from Mr. McStocker.

Q. I would ask you wheher or not this is it?

A. That is the power of attorney under which I acted.

Mr. ROBERTSON: I offer this in evidence if the Court please.

Mr. MCCLANAHAN: I object to it as incompetent, irrelevant and immaterial, it not being a power of attorney which is broad enough to cover the act done in the premises by Mr. Ables for Mr. McStocker, namely: The signing of the contract sued on. It is so held by the Supreme Court.

Mr. ROBERTSON: The Supreme Court has already told us that we may show ratification.

66 We desire to put this in to show that it was ratified, and also the circumstances under which the agreement with Harrison was ratified. Not only that, but to show the relation that existed between Ables and McStocker at the time this contract was entered into.

It is admissible to show the relations existing between the principal and the party acting for him in cases of authority or without authority.

(The jury was here excused pending argument, after which they returned into Court.)

Mr. MCCLANAHAN: If the Court please we make further objection to the receipt of this power of attorney on the ground that no ratification has been shown, and we ask that it be admitted, if admitted at all, on the understanding that ratification of the contract will be shown by the plaintiff, otherwise that it be stricken out.

The COURT: Of course that is so Mr. Robertson. Of course if ratification is not shown, the Supreme Court having determined that this power of attorney gave no power to Mr. Ables to enter into this agreement on behalf of Mr. McStocker——

Mr. ROBERTSON: I understand that it is necessary for us to show ratification as to three of these decendants, yes, your Honor, Mr. McStocker and Mrs. Emerson.

The COURT: With that understanding, that the ratification of this agreement will be shown, the objection will be overruled.

Mr. MCCLANAHAN: Exception.

The COURT: The power of attorney now offered may be received in evidence and marked Plaintiff's Exhibit "B."

(Power of Attorney read in evidence.)

Mr. ROBERTSON:

67 Q. What plan was followed by the African Pacific and Indian Hagey Company in regard to doing business under its Articles of Copartnership, how did you operate your business?

A. First went to Auckland, after some weeks opened an Institute, treated patients, and endeavored to dispose of additional territory.

Q. What do you mean by disposing of additional territory?

A. Well, we got pretty—we held the entire islands of the Pacific and disposed of some portions of that, we made that effort.

Q. Well, how did you disp-se of territory, what do you mean by disposing of territory, you don't own any island there, did you?

A. Sold the right.

Q. Right to what?

A. Use this formula and conduct institutes. It is similar to a patent right I suppose.

A. In different parts of the country over which you had rights to sell, the Hagey formulas?

A. That was part of the purpose of the Company, that it was organized for.

Q. What is that?

A. I say it was part of the work that the Company organized for and what we endeavored to do.

Q. To sell the territory?

A. To sell the territory.

Mr. McClanahan: If the Court please I ask that the statement of the witness that it was part of the work of the Company to sell part of the territory, may be stricken out as incompetent, irrelevant and immaterial. The Partnership Articles are the best evidence.

Mr. Robertson: I am willing the last answer should go out.

The Court: The answer may be stricken out.

Mr. Robertson:

Q. Your Partnership Articles, Mr. Ables, state that you
68 copartners associate yourselves together for the business of administering the formulas known as Hagey Gold Cure and in the assignment and disposition of institutes organized for the purpose of administering said formula.

Now how did you proceed in the Colonies there, how did you proceed to carry out those objects of your Copartnership Articles?

A. Well, the first thing we did——

Q. What did you do?

A. The first thing we endeavored to do and — do, was to get a suitable place for carrying on this business, we rented a house.

Q. Yes?

A. And we advertised in the papers, interviewed leading citizens that we thought would be of assistance to us in establishing these institutes. We engaged a physician and we canvassed for patients and opened an institute.

Q. That was at Auckland?

A. Yes.

Q. Now you have referred to selling territory. How did you sell territory?

Mr. McClanahan: That has all been stricken out.

The Court: Yes. What else did you do?

(Last question read.)

A. How did we sell it?

(Last question read.)

A. Well, at the instance of Mr. Harrison we traded him a right to go down into Tasmania, the portion of the right for a run that he had with some sheep on it. That is one way. That is the way we did with him.

Q. Did you sell any other territory besides Tasmania?

A. There was an interest sold in New South Wales.

Q. To whom was this sale of territory in Tasmania made?

A. We traded with Mr. Harrison and Mr. Gilmore. We traded an interest to Mr. Harrison and Mr. Gilmore.

69 Q. Was there any written agreement with reference to this sale?

A. Yes, sir, there were papers drawn.

Q. I will ask you whether or not this is the contract that the Partnership made with Harrison and Gilmore (handing witness paper)?

A. There was—If the best of my memory serves me, three different documents with little alterations, I think that is one of them, the last one.

Q. I call your attention to the date, it is dated on the 1st of October. Do you recollect if that was the last one?

A. It is about 6 years ago—it is 6 years ago. They were changed from time to time, and to the best of my memory there were three of them similar, though I can't remember now whether this is the the first or last one.

Q. You can't identify this as one of them, can you?

A. Yes. Whether there was one before this or after that, I am not positive as to that, they were changed from time to time.

Mr. ROBERTSON: I offer this in evidence.

Mr. MCCLANAHAN: I object to it as incompetent, irrelevant and immaterial, purporting to be a contract with the African Pacific and Indian Hagey Company, a copartnership and there is no showing of authority in George D. Moore.

We object to it on the further ground that it purports to be signed by J. A. Magoon by his attorney- J. K. Kirkpatrick and T. I. Cowert; there is no showing of any signing of J. A. Magoon's name by J. H. Kirkpatrick and T. I. Cowert.

On the further ground that Dorothea Lamb's name is signed by Kirkpatrick and Cowert, who were not shown to have authority.

On the further ground that F. B. McStocker's name is signed by L. A. Ables, and no showing of any authority for signing this kind of a contract, that is introduced in evidence here, and was so

70 held by the Supreme Court.

On the further ground that it is a contract beyond the purview of the Articles of Copartnership of the African Pacific and Indian Hagey Company, in that it purports to deal in what are known as the Thompson formulas for the cure of alcoholism, formulas that are not shown to belong or have any relation whatever to the African Pacific and Indian Hagey Company.

On further ground that it recites and is signed by a man named Wolvington with whom the African Pacific and Indian Hagey Company are not shown to have had any business whatever or any connection.

On further ground that it is signed by A. E. Pouter by his attorney T. E. Cowert and -here is no showing of any authority to make that signature.

On the further ground that it purports to sell territory, which is a transaction beyond the scope of the contract, the business of the partnership being limited to the sale of institutes that had been established by the Company.

Mr. ROBERTSON: Of course we can't put in our whole case at once. We intend to put in further the power of attorney executed by Mrs. Emerson and J. A. Magoon to Cowert and Kirkpatrick. We also propose to show how Wolvington became associated with the Company and how they acquired the Thompson formulas.

The COURT: How about Pouter?

Mr. ROBERTSON: Pouter is not represented here and we contend that counsel has no right to make an objection that Pouter might make.

The COURT: This all goes in subject to your promise to show ratification.

71 Mr. ROBERTSON: To show ratification.

Objection overruled. Exception.

The COURT: It may be received in evidence and marked Plaintiff's Exhibit "C."

(Contract read in evidence.)

Mr. ROBERTSON:

Q. Under what authority did you sign F. B. McStocker's name to this agreement?

Objected to as immaterial. Objection overruled. Exception.

A. Under that power of attorney from Mr. McStocker which you introduced there, under that.

Q. What is that?

A. I signed it under the power of attorney that is introduced.

Q. This agreement states that Mr. Harrison has contributed 2000 Pounds Sterling as consideration to be paid by him in entering into this agreement?

A. It wasn't any 2000 Pounds.

Q. What was it?

A. It was a number of sheep and a sheep run or leasehold, a certain number of sheep on there that no one knew how many there were. There were sheep there, supposed to be, I never saw them.

Q. How was the arrangement made whereby Harrison was to contribute this sheep run and sheep?

A. Made through Mr. Cowert and Kirkpatrick.

Q. What did you have to do with making the arrangement?

A. A bill of sale was made to me, I sold the sheep.

Q. A bill of sale made in our name?

A. My personal name.

Q. Why was it made to your personal name?

A. Well, I will have to explain matters a little with ref-
72 erence to the Colonies, I think, to get to that. The rules of doing business there are a little different from here. I know that the money I kept in the bank I could not keep in the name of the Company, or L. C. Ables, Trustee, I had to keep it in my own personal name, and it was explained to me that it was easier to have it in my name than to have it in the name of the Company. They were disposed of for the Company. They were disposed — for the benefit of the Company.

The COURT:

Q. That was a mere matter of convenience, was it, Mr. Ables?

A. I took it as I say, that is the reason I explain this custom, it is easier to handle than if it had been in the corporation's. When I put the monies in the bank in Auckland I found if I put it in the name of the Company that I would have to have a number of signatures to each check to get it out to pay a bill. And I could not even put it in my own name as Trustee, as is done in this country, so I put the fund in my own personal name.

Q. Your attention is directed to this bill of sale?

A. In either matter, an easier matter to dispose of it.

Q. Both for the convenience of your copartners that the bill of sale was made to you personally——

A. For the purpose of negotiating the sale.

Q. For the convenience of the African Pacific and Indian Hagey Company?

A. Yes, sir.

The COURT:

Q. For the convenience of transacting the business of the copartnership?

A. It was put in my individual name.

Mr. ROBERTSON:

Q. Well, what was done with the sheep run and sheep that the partnership acquired from Harrison?

73 A. They were sold.

Q. For how much?

A. 500 Pounds.

Q. What was done with the 500 Pounds Sterling?

A. 500 Pounds Sterling.

Q. Equivalent to about $2500 in American money?

A. Yes, sir.

Q. What was done with that money?

A. It was put in the general fund.

Q. General fund for what?

A. For the partnership for which I was treasurer, secretary and treasurer.

Q. And what was done with that general fund?

A. A great deal of it was used in the general expenses.
Q. Yes?
A. Carrying on the business.
Q. Yes?
—. The majority of it was used that way, that is, most of the money.
Q. Yes? Was the general fund used for any other purpose?
A. We paid a dividend, one dividend.
Q. To whom was the dividend paid?
A. To the shareholders as represented according to my books, to the parties, either to them or their people representing them.
Q. Did each of the partners in the African Pacific and Indian Hagey Company share in that dividend?
A. To the best of my knowledge and belief they each got their money. It was not paid to them directly because they were not there.
Q. But it was allowed in the manner indicated in the Articles of the African Pacific and Indian Hagey Company?
A. Yes, sir.

74 Mr. ROBERTSON:

Q. In the proportion stated in the African Pacific and Indian Hagey Company Articles?
A. It was, yes, sir, as they existed at the time.
Q. What was done with the share of the dividend belonging to Mr. Magoon?
A. It was receipted for either by Mr. Cowert or Mr. Kirkpatrick.
Q. What was done with the share of the dividend belonging to Mrs. Emerson?
A. It was receipted for by one of those.
Q. Did you know that those gentlemen held powers of attorney from Mr. Magoon and Mrs. Emerson.
A. I did.
Q. What was done with the share of dividend belonging to Mr. McStocker?
A. I receipted for it, purchased a draft and mailed it to Mr. McStocker.
Q. Remitted it?
A. I did.
Q. You know how much it was?
A. I could not tell without referring to the book.
Q. Will the book refresh your memory?
A. It will tell me the exact amount charged to him and what the draft received would be.

The COURT:

Q. The cost of the draft?
A. The exchange, that would be the only difference.

Mr. ROBERTSON:

Q. You may refresh your memory?
A. 186 Pounds, 7 Shillings and 5 Pence.

Q. That was Mr. McStocker?
A. That was the amount of his dividend.

Mr. McCLANAHAN:

Q. 186 what?

A. 186 Pounds, 7 Shillings and 5 Pence. The draft may
75 have been—the exchange less than—I probably took out what it cost me for exchange.

Mr. ROBERTSON:

Q. Can you state what Mr. Magoon's share of that dividend was?
A. 466 Pounds and 4 Pence.
Q. And what was Mrs. Emerson's share?
A. 93 Pounds, 1 Shilling and 6 Pence.
Q. Can you state Mr. Ables', or I ask you do you know how Mr. McStocker received the remittance that you remitted him at that time?
A. I know that I wrote him a letter saying that I had sent a draft to the best of my knowledge and belief and I got a receipt from it,—an acknowledgment I would say, not receipt.
Q. I will ask you when was that remittance made to Mr. McStocker of that dividend?
A. 30th October, 1897, I think, ain't it? That is the date, October 30th.
Q. Have you any copy of that letter written by yourself to Mr. McStocker making that remittance?
A. I have not.
Q. Can you state whether or not you informed Mr. McStocker of the sources from which the funds were derived out of which these dividends were declared?
A. I can't state whether I did that mail or not. I sent the trial balances from time to time and statement, and kept the books.
Q. Did you send anything else besides trial balances to Mr. McStocker?
A. I didn't send him a copy of that agreement, I don't think.
Q. Well, you wrote letters to him, did you not?
A. I wrote to him.
Q. State whether or not you kept him informed of what the partnership was doing or your managers were doing in Auckland?
A. I wrote to him and kept him informed the best I could. I was not thoroughly informed sometimes myself.
Q. You were fully informed as to this contract were you not?

76 A. Yes, sir.

Q. You advised him fully as to that, did you not Mr. Ables?
A. Whether I advised him fully as to it, I don't think I did enter into details. I wrote him a letter and told him we had made a contract for some territory, for some sheep of uncertain value; I told him that, at least that is my recollection; I have no copy of the letter.

Q. Informed him that you traded territory for sheep?
A. Yes, sir, I have, I informed him to that effect.
Q. Mention the valuation?
A. Valuation uncertain, to the best of my knowledge and belief, because I don't know what it was worth,—there didn't *a-h*body at that time, that I could find out.
Q. Did you tell him the Company had taken them at 2000 Pounds?

Mr. McCLANAHAN: I object to that. The writing speaks for itself.
Mr. ROBERTSON: I ask you to produce it.

Q. I will ask you whether this paper headed memorandum signed by yourself, dated September 30th, accompanied the remittance of Mr. McStocker's share of the dividend, or was it with some other letter?
A. I don't think that is the one that came with the memorandum because this date—with the money——

The COURT:

Q. Don't what?
A. That didn't come with the money, because that is dated September 30th and the dividend was paid, as well as I remember October 30th.

Mr. McCLANAHAN:

Q. That is the letter called for by counsel, the letter referring to notification of the sheep deal?
A. There are different dates.

Mr. McCLANAHAN: We would like to have that read in evidence.
77 Mr. ROBERTSON: The witness says himself it is a different date.
Mr. McCLANAHAN: The witness says the dividend letter is a different date, but that is the letter you called for.

Mr. ROBERTSON:

Q. Can you tell Mr. Ables, whether that thing there is a complete letter?
A. I can't that is 6 years ago and over and I don't remember if that is a letter, if that is a letter of financial facts; it refers to the financial facts. There may have been another letter coming after it, I don't remember.
Q. If that was a complete letter it would be addressed to Mr. McStocker, wouldn't it?
A. That is marked memorandum up there on the top. It is a memorandum.
Q. Addressed to nobody. Well can you say whether or not you sent that to Mr. McStocker?
A. That is my writing. That is my memorandum.
Q. That is your signature?

A. That is my signature. And those are the facts as they existed on the books.

Q. And is that note dated October 2nd also your writing?

A. That is mine.

Mr. ROBERTSON: I will put this in evidence if your Honor will allow it in.

The COURT: It may be received in evidence and marked Plaintiff's Exhibit "D."

Q. What sale of Tasmania did you refer to in this letter, Mr. Ables?

A. The sale made to Mr. Harrison and Mr. Gilmore.

Q. What sheep are referred to in this letter?

A. The sheep that he traded us for that proposition.

78 Q. The Harrison sheep?

A. Yes.

Q. Are you able to state from that memorandum there whether anything else accompanied it, a trial balance or something else, for instance you refer to certain figures there?

A. It would only be a surmise of mine. I am not positive.

Q. For instance, the 250 pounds?

A. Well, that speaks for itself.

Q. Well, what 250 Pounds is that?

A. That refers to the 250 Pounds credited for Mr. Gilmore.

Q. Had you informed Ables of the Company getting 250 Pounds from Mr. Gilmore?

The COURT: Informed Mr. McStocker, you mean.

Mr. ROBINSON: Mr. McStocker, yes, certainly.

A. I referred to in that letter. I don't remember what further reference I made to it. I perhaps referred that it was on the trial balance.

Q. How often did you send trial balances to Mr. McStocker?

A. I would have to depend on my memory to answer that question, Mr. Robertson.

Q. Naturally.

A. I took a trial balance every month, had a trial b-lance and copied off one every month, and I sent them to him frequently, probably not every month, because some months there were practical-y very little addition.

Q. Well did you forward a trial balance every time there was anyt-ing of importance, that is, change of importance in the figures on the books?

A. It was my duty to keep him posted and I endeavored to do so to the best of my knowledge.

Q. Can you state whether you communicated, by any other letter or memorandum than the one read, to Mr. McStocker any

79 information in regard to the Tasmanian deal or the Harrison sheep?

A. It is a matter of memory with me. Mr. McStocker has got the letters, got some letters.

Q. You said, after selling the sheep, as I understood you and collecting the money, you reported to Mr. McStocker; is that so?
A. I sent him copies of the trial balances. The language that I used, the exact language of the report I can't remember.
Q. When I first showed you this memorandum, that has just been read, you said that is not the one. It is not what one?
A. You asked me if that was the one I wrote him when I sent him the dividend. I said that was not the one because that was dated September 30th and the dividend was paid October 30th.
Q. Did your letter that accompanied the dividend have anything to say about the Tasmanian deal of the Harrison sheep?
A. I would like to see what is in that letter, I have not seen it since that time, 6 years ago. Mr. McStocker has it.

Mr. ROBERTSON: I ask counsel to produce it.
Mr. MCCLANAHAN: I suppose that is the letter, the statement of the dividend is on it.
The COURT: What is the date of that Mr. Robertson?
Mr. ROBERTSON: October 29th.

The COURT:

Q. Cash is credited on October 30 and not the 29th, is that correct?
A. It says October 30th and there was only one dividend.

Mr. ROBERTSON:

Q. I would ask you if that is the letter, Mr. Ables, that accompanied the dividend sent to Mr. McStocker?
A. This is the letter.
80 Q. Is this typewritten memorandum any part of your letter?
A. No, that was not done by me. It looks familiar to me though I think Mr. McStocker's typewriter did that.
Q. This memorandum on the 3rd page of your letter is a part of the letter?
A. That is a part of the letter, it agrees with the books.

Mr. ROBERTSON: I offer this in evidence if the Court please.
The COURT: It may be received in evidence and marked Plaintiff's Exhibit "E."

Q. Who is this T. E. C. referred to in your letter?
A. Mr. Cowert, T. E. Cowert.
Q. And J. A. M.?
A. J. A. Magoon.
Q. And C. A. K.?
A. Kirkpatrick.
Q. Cowert and Kirkpatrick?
A. Cowert and Kirkpatrick.
Q. Did you write any other letter that you recollect of to Mr. McStocker referring or relating to the sale of Tasmania, of the Harrison sheep?
A. I have to depend entirely on memory as to what letters I wrote. I have no copies of them. I wrote him a lot of letters, but what

the contents of them are I don't know. Mr. McStocker has those letters.

Mr. ROBERTSON: I ask counsel to produce any other letters that they have referring or relating in any way to the Tasmanian deal.

Mr. MCCLANAHAN: There are none. We will produce if you want all correspondence passing between Mr. Ables and McStocker after the deal.

Mr. ROBERTSON:

Q. Did you correspond with Mr. Magoon at all, Mr. Ables?

81 A. I may have written him one letter. I don't remember having written him any. I may have written him one, and may have written two, I don't remember just now.

Q. I show you a paper headed trial balance, November 30, 1897, and ask you if it is in your handwriting?

A. This is in my writing, November 30, 1897.

Q. Will you state whether or not that is one of the trial balances you forwarded to Mr. McStocker?

Q. That is one of my trial balances, it is my writing, and it agrees with the books because I made it out. It looks familiar and I believe it to be one I sent over to him.

Q. It looks familiar?

A. I believe it to be one that I sent either to him or Mr. Magoon, I believe it to be one that I sent Mr. McStocker, it is just like a number of others that I sent him, similar to that.

Mr. ROBERTSON: I offer this in evidence if the Court please.

Mr. MCCLANAHAN: I object to is as not having been properly identified as having been sent to any one.

Mr. ROBERTSON: I propose to show, if counsel will not admit it, at the last trial counsel for defendant- produced this himself. In other words, coming from the counsel for defendants it is admissible against the defendants.

Q. Don't you remember seeing this trial balance on the last trial Mr. Ables?

A. No, I don't recall it to mind, Mr. Robertson.

Q. Don't you remember identifying that,—this is one of those you sent to Mr. McStocker?

A. If it was shown to me I testified it was one of my trial balances.

Q. Did you ever send that trial balance to Mr. Magoon?

82 A. I may have done so, but to Mr. Magoon I don't remember.

Q. You say you have written him one or two letters?

A. I wrote him one or two letters.

Q. You remember sending him any trial balances or other letters?

A. I don't say positively that I wrote, but think I may have written to Mr. Magoon.

Q. You don't think you enclosed him a trial balance?

A. Yes, I think probably I would, I don't know, I could not say. That is my trial balance, but whether I sent it to anybody I am not prepared to testify.

Mr. ROBERTSON:

Q. I will ask you this, Mr. Ables, whenever you forwarded a trial balance to Mr. McStocker state whether or not you also forwarded them to Mr. Magoon and Mrs. Emerson?

A. I did not, because I knew Mr. McStocker and Mr. Magoon were closely related and being in the same business I did not think it was necessary to send each and every one of them a trial balance, I don't think I should have done so.

Q. In other words, that one was sufficient for the three?

A. Yes, sir.

Q. Have you sent any trial b-lance to Mr. Magoon; and did you send a copy of that to Mr. McStocker?

A. I may have done so, but I don't think I should; I don't think I have.

Mr. ROBERTSON:

Q. Mr. Magoon, Mr. McStocker and Mrs. Emerson were all living here in Honolulu at the time?

A. All living here and closely related.

Q. Mrs. Emerson being in Mr. Magoon's employ?

83 A. She was in the office.

Q. In his office?

A. Yes.

Mr. MCCLANAHAN: I object to this as incompetent, irrelevant and immaterial.

Mr. ROBERTSON: I will undertake to prove it to be a fact that the trial balances were sent to and produced by the defendant-.

Objection overruled. Exception.

The COURT: The instrument may be received in evidence and marked Plaintiff's Exhibit "F."

(Here the Court after the usual admonition to the Jury took a recess until 1:30 P. M.)

Afternoon Session.

Direct examination of L. C. ABLES resumed:

Mr. ROBERTSON: When we adjourned I was about to read this trial balance.

(Trial Balance read in evidence.)

Mr. ROBERTSON: I also read the indorsement upon this paper as follows: "Defendants' Exhibit "2" T. M. Harrison *vs.* J. A. Magoon, *et al.* Trial October 8, 1901. A. J. "Kaulukou, Clerk."

Q. There is an item in this trial balance, Mr. Ables, of territory credited with 5045 Pounds. What does that item refer to?

A. It was a credit balance of an account that I called territory account for districts for money that we had received for interest in those districts.

Q. Those districts being Tasmania and New South Wales?

A. There was money received from Tasmania and New South

Wales. I don't remember whether there was any others in-
84 cluded in that account or not, but whatever money was received from territory was credited to Territory account.

Q. Were there any other sales of territory that produced proceeds, other than Tasmania and New South Wales?

A. They made a deal of New Zealand Territory there but I don't think there was any money.

Q. And whatever money came in and was credited to the account of territory was either from Tasmania or New South Wales or both, was it?

Mr. McCLANAHAN: One moment, unless counsel proposes to bring that knowledge home to some of the defendants, I don't know to which defendant that particular account applies, but there is no evidence to whom it was sent,—I object to it as incompetent, irrelevant and immaterial. It is attempting to show by this witness's statement what that is composed of by a means of ratification, by somebody who received it, when on its face it does not show what territory it covered at all. I object unless counsel proposes to show and shall ask to have it stricken out, unless it is shown that it was brought home direct to some of the defendants here, which one I don't know, or all of them. I object to Mr. Ables stating what the territory is that is included in that credit item, unless it be shown that that was made known to some of the defendants.

Mr. ROBERTSON: In connection with proving ratification, if the Court please it is necessary to prove, as counsel contended in the argument this morning, knowledge on the part of the persons whom we charge with ratification.

85 The COURT: The motion to strike out is denied.

Mr. McCLANAHAN: Exception.

The COURT: Objection overruled.

Exception.

(Last question read.)

The COURT:

Q. What is your answer Mr. Ables?

A. I don't understand the question yet, Judge, I don't understand the question, I don't understand the question yet.

(Last question read.)

A. Whatever sales had been made prior to that, that was the balance on that report, that trial balance; whatever sales had been made prior of any territory, that was the balance, credit balance, whether it was the Tasmania or any other territory.

The COURT:

Q. Well there was no other territory other than Tasmania or New South Wales at that time from which you did receive proceeds, was there, Mr. Ables?

A. I can't answer that question without consulting my books, that is 6 years ago, I can't remember.

Q. You have no independent recollection of it?

A. No. I know that statement is correct from the books but I cannot carry those things after six years.

Mr. ROBERTSON:

Q. You know whether or not any cash was received from the sale of any territory in New Zealand?

A. I am not positive of that. There may have been some small proportion of the cash——

Q. Were there any others than those three, than New Zealand, New South Wales and Tasmania?

86 A. I don't remember any at this time. The books show.

Q. In that letter to Mr. McStocker of October 2nd, 1897, you refer to Mr. George D. Moore coming up here to Honolulu. Do you remember whether or not he came at that time?

A. He did come.

Q. For what purpose?

A. I helped to put up his passage money with the understanding that he was to come back here and explain to the parties here the status of affairs better than I could write it.

Q. The transactions of the Company in New Zealand?

A. The general business, all appertaining to it.

Q. Do you know whether or not Moore did make such explanation to the parties here in Honolulu?

A. I only have his word for it.

Q. Did you see him after he returned again from Honolulu?

A. Yes, sir.

Q. To New Zealand?

A. I think I did.

Q. Now on your return to Honolulu from New Zealand, did you ascertain from Mr. McStocker or Mr. Magoon what information Moore had given them?

A. They said Col. Moore had been here and I think he complained that he did not make things very plain to them; that is my recollection.

Q. What else do you recollect that they said in regard to information acquired from Col. Moore?

A. They stated that he was not here but a short time, and they could not, they did not, the explanations were not very clear from him,—that is the sum and substance of it.

Q. Did they or either of them tell you that Moore had

87 spoken to them in regard to the sales of territory?

A. I don't remember any conversation appertaining to that.

Q. Did you receive any letters from either Mr. Magoon or Mr. McStocker dated subsequent to the arrival of Mr. Moore here, did they write you that Moore had arrived?

A. Yes, I think I heard from Mr. McStocker that he had arrived. In fact I am positive of that.

Q. Have you that letter?

A. No, I have no letters.

Q. What has become of them?

A. I destroyed all my private correspondence, and all the correspondence appertaining to the business, which was the business correspondence, I left there when I resigned and came away.

Q. So at the present time you have no letters received from McStocker?

A. I have none at all.

Q. Can you remember what McStocker wrote you with reference to the information acquired from Moore in regard to the Hagey Co.'s affairs?

A. To the best of my knowledge Mr. McStocker wrote me that he could not get much satisfaction out of the Colonel, did not understand him very fully.

Q. Anything else?

A. He may have written something else. That is the best of my recollection with reference to the visit of Col. Moore.

Q. Did they have anything to say in regard to the Harrison agreement, did Mr. McStocker have anything to say in regard to the Harrison agreement?

A. I do not remember that he did.

88 Q. Or the sheep transaction, anything with reference to the sheep transaction at all?

A. I can't call it to mind.

Q. He never returned the dividend that he received out of the concern, did he?

Objected to as immaterial.

Objection sustained. Exception.

Mr. ROBERTSON:

Q. You received your share of the dividend that was declared?

A. I did.

Q. And have retained it since?

Objected to as immaterial.

A. No it was spent a long time ago.

The COURT: Objection sustained.

Mr. ROBERTSON: Exception.

Q. When did you leave Auckland to return to Honolulu?

A. I got back to Honolulu in the month of March.

Q. Do you remember the date?

A. No, I don't.

Q. Don't you remember when you left Auckland?

A. I left Auckland sometime in January, I went to Sidney before I came away and sailed from Sidney to Honolulu.

Q. You came to Honolulu by way of Sidney, did you?

A. Yes.

Q. When did you leave Auckland then?

A. To the best of my remembrance sometime the latter part of January. I can tell from my book there when I took a receipt from Mr. Cowert for the balance, that will give the date practically Jan-

uary 24, 1898 I turned over the balance of the cash and took a receipt from Mr. Kirkpatrick and Cowert.

89 Q. And it was on or about that date that you left Auckland for Honolulu by way of Sidney, was it?

A. Yes sir, it was within a day or two of that date that I left for Sidney and then came from Sidney home. It cost no more to come from Sidney than it did from Auckland, fares are the same.

Q. What is that?

A. The fares to Sidney and from Sidney to Honolulu is the same as from Auckland to Honolulu. I bought a ticket when I went to Auckland for Sidney the price being the same, so I ran over there and came back here.

Q. And you arrived in Honolulu in the month of March 1898?

A. Early part of March, sometime about the 10th or pretty near the time I left, I know it was 11 months from the time I was gone, within a day or two, a few days.

Q. 1898?

A. 1898.

Q. On arriving here did you interview Mr. McStocker or Mr. Magoon or Mrs. Emerson, with reference to the Hagey Company business?

A. I made a report to them.

Q. Did you have a meeting together?

A. We met in the office together I think as well as I remember, yes, we talked the matter over.

Q. What information did you convey to them at that time in regard to the affairs of the Hagey Company?

A. I brought a statement of my affairs and this book and showed it to them.

Q. A written statement?

A. Well this is a written statement, this is a copy, a certified copy of all the transactions.

Q. You showed this book to them, did you?

A. Yes, sir.

The COURT:

90 Q. Who were present at that time?

A. Mr. Magoon and Mr. McStocker and myself talked the matter over.

Q. Was Mrs. Emerson present?

A. I don't remember.

Q. Where was the meeting held?

A. As I remember it in Mr. Magoon's office.

Mr. ROBERTSON: I offer this book in evidence, if the Court please.

Q. This is the book that you refer to as having submitted to your copartners?

A. Yes, sir.

The COURT: It may be received in evidence and marked Plaintiff's Exhibit "G."

Mr. ROBERTSON:

Q. At this conference you refer to was anything said with reference to the agreement with Harrison?
A. I don't think so, I don't remember.
Q. Anything said with reference to the sheep?
A. I cannot positively remember whether I explained about the sheep too or not.
Q. Did they ask you any questions about the sheep deal?
A. I don't remember whether we went into the details about the sheep.
Q. Was anything said as to what funds this dividend that had been remitted to them was composed of?
A. I don't remember that there was. They had a statement at the time it was signed by them.
Q. The statement that you sent them at that time showed how it was derived, did it.

Mr. MCCLANAHAN: The statement will speak for itself.

Mr. ROBERTSON:

91 Q. Please tell your counsel what statement you refer to?
A. When the dividend was sent, there was a statement came the same time.
Q. Please produce it.
A. Written statement, you mean?
A. Yes, sir.

Mr. MCCLANAHAN:

Q. Statement of what?
A. How this money was made up. You have it here this morning.
Q. It has been produced in evidence?
A. It was here this morning, letter shown to me.
Q. Has it been produced in evidence?
A. I think it was, yes.

Mr. MCCLANAHAN: The statement will speak for itself.

Mr. ROBERTSON:

Q. What do you refer to?
A. The letter that shows the amount that was refunded from the fund left over that was made up at Honolulu and the 18 per cent.
Q. Do you recollect about this letter of October 29th to Mr. McStocker?
A. I believe that is the date of it at the bottom there, it shows how the amount of 186 Pounds, is it not, is made up.
Q. It says here 18 per cent. dividend declared this day, that would be 162 Pounds?
A. Yes, sir.
Q. Is there any statement to show what constitutes the 162 Pounds?
A. I don't remember. I don't see how I could segregate one

money from the other. There was no financial statement of the Company ready.

Q. Where is that financial statement?

A. I could not tell you. I think you had it this morning.

92 Q. Do you mean this memorandum here? That doesn't show how that 162 Pounds, 18 per cent. dividend is made up.

A. It is made up of the amount of the capital stock which stood in his name.

Q. Fifty Per cent.?

A. No, that is a journal entry.

Q. Did you send any statement showing what money composed this dividend or out of what fund the dividend came?

A. I could not swear to that. If I sent any statements I have no copies of them. Here is an 18% dividend, and this is the portion that was taken for the fund that we started with.

Q. When you returned from New Zealand and had this conversation with Mr. Magoon and Mr. McStocker, was anything said with reference to what moneys composed the dividend that was paid out?

A. I don't remember the conversation we had.

Q. Well, can you remember—Did you have more than one conversation with Magoon or McStocker with reference to this?

A. I don't remember how many times we talked the matter over.

Q. As a matter of fact, you went all over the details of the transactions of the concern with them?

—. ——.

Q. All over each minor detail?

A. I don't think I ever went over them.

Q. Well, never mind the minor details; over the matter of the sale of Tasmania?

A. I don't remember.

Q. Did you go into that with them?

A. I don't remember that I did.

Q. Or the sale of the New South Wales?

A. I don't remember. I explained to them that Mr. Cowert and Mr. Kirkpatrick did most all the business.

93 Q. And you kept all the books?

A. I kept all the books from all the information that I could get.

Q. Well, you know all the parties to the deal with Harrison, don't you?

A. I didn't know all the parties of any deal. I got most of that as reported to me by Mr. Kirkpatrick and Mr. Cowert.

Q. The deal with Harrison was done in your name, was it not?

A. The papers were signed, I signed the papers, yes, but the details were arranged by Mr. Cowert and Mr. Kirkpatrick, they were the attorneys for Mr. Harrison.

Q. You knew the contents of that agreement with Harrison and Gilmore?

A. I thought I did.

Q. You read it before you signed it?

A. I read it, but it was explained to me different from what it seems it has turned out.

Mr. ROBERTSON: I move to strike out the last portion of the answer, the explanation.

The COURT: It is so ordered that the latter portion of the answer go out.

Mr. ROBERTSON:

Q. After you returned to Honolulu from Auckland did you receive a notice of suit brought against you and your copartners in the New Zealand court?

A. I was served with some papers here by Mr. Moot-Smith, relative to this same case.

Q. Have you got the paper that Mr. Smith served on you?

A. I don't think I have, I might have it in my office, I have not got it here, I think I have got a copy of it.

Q. Would you recognize a copy of it if you saw it?

94 A. Yes, sir, I think I would.

Q. Please examine this?

A. This looks like the paper, but I think Moot-Smith as attorney had something to do with it, I think his name is on the paper; this looks like it.

The COURT:

Q. At the time, Mr. Ables, that you had this conversation, in Mr. Magoon's office, with Mr. Magoon and other stockholders, immediately upon your return from New Zealand, did you or did you not at that time have a copy of this contract of the Hagey Company with Harrison and Gilmore?

A. I did not, I had nothing but that book.

Mr. ROBERTSON:

Q. You had a copy before you left New Zealand, had you?

A. I had a copy at the time I signed it.

Q. Well, you turned it over with the other papers to Cowert or Kirkpatrick, when you left Auckland, didn't you?

A. I turned over the papers I had, but I didn't have very many.

Q. Do you remember whether or not among the papers there was a copy of this agreement with Harrison?

A. I don't believe it was.

Q. Do you know how many copies were made, was it signed in duplicate, triplicate or what?

A. I think there were three. There were as many as three, possibly four.

The COURT:

Q. What disposition, if you remember, did you make of the copy you had?

A. Well, to explain that, I will have to go out a little bit.

95 Mr. Cowert and Mr. Kirkpatrick,—any papers that I made out from time to time, they borrowed one or two of them and

when they got all of them, they refused to give them back to me, they didn't want me to have them, I couldn't get them back; they took several papers and refused to give them back to me.

Q. And the copy that you had was taken in that way?

A. That is my impression that it was. I could not have got them back from them, there was no way to get them back from them, it absolutely would have taken force. They took several documents that way.

Q. In this agreement that was made with Harrison, I notice the name of J. Wolvington. Will you please state who J. Wolvington was?

A. J. Wolvington was a doctor, minister, that when we arrived in New Zealand we became acquainted with, found that he was there before we were, engaged in a business very similar to us, gold cure, they are all gold cures.

Q. What formulas, do you know?

A. He purported to use the Thompson formula.

Q. How did he become connected with the African Pacific and Indian Hagey Company?

A. After we had been there sometime and found out that Dr. Wolvington was in this line of business, Mr. Cowert and Mr. Kirkpatrick called on him, they became acquainted at least and after consulting with each other they decided to amalgamate the two interests by making one company and all working together.

Q. Well, you say, Cowert and Kirkpatrick made the arrangements. Did the African Pacific and Indian Hagey Company take Wolvington in?

A. They amalgamated.

Q. By an instrument in writing or what sort of an arrangement?

96 A. Yes, sir they entered into an arrangement.

Q. Have you a copy of that agreement?

A. No, I have not. I have a general entry in my books showing it, that is all.

Q. Do you know what became of the copy belonging to the African Pacific and Indian Hagey Company, of the agreement with Wolvington?

A. No, I do not. I think it went the way, the same way as a number of other papers.

Q. Please examine this paper and see if that is a copy of the Wolvington agreement?

A. Yes, I believe that to be a copy?

Mr. ROBERTSON: I offer that in evidence if the Court please.

Mr. MCCLANAHAN: I object to it on the ground that it is incompetent, irrelevant and immaterial, and shown to have been executed by Messrs. Magoon, McStocker and Pouter by powers of attorney; there is no showing in this case that any such authority as that existed and it is not an agreement that was within the purview or the powers of one partner to make for the partnership as to formation of a new partnership.

Mr. ROBERTSON: We contend we can show ratification if the Court please.

The COURT: With the same understanding as to previous testimony with reference to the agreement with Harrison and Gilmore?

Mr. ROBERTSON: Yes, your Honor.

Objection overruled. Exception.

The COURT: Let the instrument now offered in evidence be received and marked Plaintiff's Exhibit "H."

(Agreement between the African Pacific and Indian Hagey Company and J. Wolvington, read in evidence.)

97 Mr. ROBERTSON:

Q. On what authority did you sign Mr. McStocker's name on that agreement?

A. Under the power of attorney that I held from him.

Mr. MCCLANAHAN: Now, if the Court please, I ask that this be stricken from the records on the ground that Miss Lamb's name is not signed to it at all by power of attorney or otherwise.

The COURT: The motion to strike out is denied.

Mr. MCCLANAHAN: Exception.

Mr. ROBERTSON:

Q. Will you state please, Mr. Ables, whether or not Miss Lamb's name was signed to it by her attorneys in fact Cowert and Kirkpatrick?

Mr. MCCLANAHAN: I object to that. The instrument speaks for itself.

Mr. ROBERTSON:

Q. I mean the original, not the copy?

Objection overruled. Exception.

A. I can't remember. The documents will have to speak for themselves. As far as I am concerned that looks to me like a copy.

Mr. ROBERTSON:

Q. Never mind the document speaking for itself. Don't you know as a matter of fact that Cowert & Kirkpatrick signed for Miss Lamb and also Mr. Magoon?

A. I do not know if they signed for Miss Lamb.

Mr. MCCLANAHAN: We renew our motion to strike out from the files of record. George D. Moore, also one of the parties did not sign. The Company's name is not signed at all.

98 Motion denied. Exception.

Mr. ROBERTSON:

Q. State whether or not the J. Wolvington referred to in this agreement that has just been read, is the same J. Wolvington referred to in your trial balance?

A. The same person.

Q. State whether or not the introduction of Mr. Wolvington into the African Pacific and Indian Hagey Company caused a return of part of the fund which had been subscribed by the original partners to be returned to them?

A. Part of the original agreement—I think it says that was to be refunded when it could be taken out.

Mr. McCLANAHAN:

Q. What is that?

A. The original fund Mr. Robertson refers to is the fund we took away with us on the start.

Mr. ROBERTSON:

Q. Yes.

A. The documents tell us when that should be refunded. The agreement tells us when that should be refunded.

Q. Well with what were the original members of the partnership credited when Wolvington was taken into the firm?

A. With what were they credited?

Q. Yes?

A. They were not credited at all. Their capital stock shrank in order to take him in.

Q. That is his capital stock was reduced?

A. Yes, each one took off a certain amount and it was given to Dr. Wolvington.

Q. Didn't they get credit for that percentage that was taken off?

A. No, they didn't get credit for it. It was charged to the account. I don't call that a credit.

99 Q. Don't call it a credit? It was charged to their account and credited to Dr. Wolvington's, to make up his proportions, I think they were *permitted*.

A. Yes, sir.

Q. And the result of it was to reduce the liability of the original members to contribute the original capital that they had bound themselves to contribute, was it not?

A. I don't understand it that way.

Q. Well, when you started in, you original partners agreed to put up 500, didn't you?

A. It was divided, the amout of the stock, that is the entire capital stock of 105,000 was divided in the proportion as referred to in the agreement, in the contract partnership papers.

Q. So you regarded that then rather in the light of paid-up stock?

A. That is the amount that was credited to each partner when I opened the books.

Q. I don't understand it that way. Now after Harrison entered into this agreement with you, upon which this suit is brought, state whether or not he proceeded to Tasmania?

A. He was a long time getting away when he was reported to have gone to Tasmania.

Answer stricken out as not responsive.

Mr. ROBERTSON:

Q. Don't you know that Robertson started for Tasmania?
A. He started two or three times.
Q. Now after the first time he started did you address any letter to him at Sidney?
A. I think I did.
Q. State whether or not you sent anything with that
100 letter?
A. There was some medicines and documents that was sent with it, Mr. Cowert got them ready and I wrote that letter.
Q. What kind of documents accompanied the letter?
A. It came out in the trial the last time that there was instructions, I think they were *permitted.*
Q. And you forward- the medicines and instructions to Harrison, did you not?
A. I don't know as I forwarded them but I wrote a letter that accompanied them, to wit, about the same time.
Q. I will ask you if this is the letter you refer to?
A. I wrote that letter.

Letter offered in evidence.
The COURT: It may be received in evidence and marked Plaintiff's Exhibit "I."

(Letter read in evidence.)

Mr. ROBERTSON:

Q. This money that you forwarded to Mr. Harrison and referred to in this letter was that preliminary fund that was raised in accordance with your agreement with him to start the office in Tasmania?
A. Yes, sir that was the fund that was raised for that purpose.
Q. And the medicines that are referred to here are the Hagey remedies?
A. Yes, sir.
Q. And the instructions referred to here, instructions as to the treatment of patients by the Hagey system?
A. Yes, sir, I believe that is it. Mr. Cowert and Mr. Kirkpatrick did the shipping. I wrote the letter.
Q. With whom was the arrangement for the sale of the New South Wales territory made?

101 Objected to as immaterial.
Objection sustained. Exception.
The COURT: This contract includes nothing but Tasmania does it?
Mr. ROBERTSON: That is all your Honor.

Cross-examination of L. C. ABLES:

Mr. MCCLANAHAN:

Q. You say that Mr. Moore's proportion of the capital in the African Pacific & Indian Hegey Co. was credited to him on the

books. Do you know whether he paid anything into the Company?
A. For that amount that was credited to capital stock?
Q. Yes.
A. I don't know that of my own knowledge.
Q. You don't know it.
A. No.
Q. Where did you get that, from whom, the authority to
102 make that credit on the books?
A. According to the partnership papers that showed the interest that each individual had in the enterprise.
Q. And you took that as your sole authority for giving him credit on the books?
—. I took that as the memorandum dividing or making an entry on my books showing each man's interest, that and the information I had otherwise.
Q. What is this otherwise information?
A. I knew that I had paid in my money for my proportion for instance.
Q. You knew that you had paid in yours, and you knew Mr. Magoon had paid in his?
A. I knew that he was reported to have done so.
Q. Where was your money paid in?
A. Some of it was paid here in Honolulu, some of this, it was paid to this man Sutton in San Francisco.
Q. How do you know it was paid there, were you there?
A. I was there.
Q. How much was paid there at the time?
A. I could not tell you that.
Q. How much did you pay over?
A. I can tell you how much was paid in, I put in altogether, I don't know how much I put in before that.
Q. How much?
A. Eight thousand.
Q. Do you know how much was paid in at that time by Mr. Magoon, yourself and McStocker and Mrs. Emerson?
A. Mr. Magoon's share was 12,500. I didn't handle the money but that is the amount that he was credited for, and I took
103 it for granted he had paid it the same as I had.
Q. How was your money taken up there, do you know, by check?
A. Mr. Magoon sent the most of it up.
Q. You know in what shape it went up?
A. A draft. To his agent up there.
Q. How large was the draft, do you know?
A. I could not say positively.
Q. So that all you know about Moore's payments is the statement contained in the Articles of Copartnership?
A. They represented that that was his interest in the African Pacific and Indian Hagey Company.
Q. And that is all you know about his having paid that money into the concern?

A. I never saw the money.

Q. To whom was the money paid that constituted the fund for the carrying on or prosecution of the business in Australia?

A. I took charge of that fund.

Q. Where did you get that fund from Mr. Ables?

A. I got mine from my own bank account.

Q. Yes?

A. And if my memory serves me, that Mr. Magoon and Mr. McStocker paid theirs in in a similar manner. I added that up, that amount.

Q. Did Mrs. Emerson pay any?

A. I think Mr. Magoon paid it for her.

Q. Yes, who else paid in?

A. Mr. Cowert and Mr. Kirkpatrick.

Q. Paid their share?

A. Yes.

Q. To you?

A. I received the draft before I went away. I had it in my custody.

104 Q. Who else paid in?

A. Mr. Cowert and Mr. Kirkpatrick paid for the other members constituting the partnership. I held the money, when I went for, for each and every one of them, that is there was no delinquencies.

Q. Did Moore pay any?

A. He didn't pay it himself.

Q. Did Cowert pay it for him?

A. Either Mr. Cowert or Kirkpatrick.

Q. How do you know?

A. Because Mr. Moore was not here at the time and could not have paid it himself.

Q. How do you know that Mr. Moore through them paid it?

A. What is that question?

Q. How do you know that Mr. Moore through Cowert and Kirkpatrick paid you his proportion of the preliminary fund?

A. Well I know I received the money from one of them and it was represented as his proportion.

Q. So you don't know that Mr. Moore paid it through them?

A. They may have put it up for him unbeknown to him, I don't know.

Q. You don't know that Mr. Moore knew anything about the African Pacific and Indian Hegey Co. management at the time this money was paid?

A. He could not have known anything about it.

Q. Where was he?

A. He was in the Colonies or on his way there.

Q. The arrangement then was made without his knowledge?

A. Made without his knowledge.

Q. Then this fund was advanced, if advanced at all, without his knowledge?

A. He could not have known it.

Q. How would it have been possible for Mr. Moore to have
105 advanced his part of the capital stock of the Company if he was away at the time the Company was formed?

A. He came here, was in the Hagey business here, and was represented as a partner then with Mr. Cowert and Kirkpatrick, and they represented that that was his interest. Of course I didn't talk with Mr. Moore.

Q. His interest in what?

A. In the business.

Q. I am talking about the African Pacific and Indian Hagey Company, now, that I understand was a company formed when he was not here?

A. Yes, he was not here.

Q. Well, then, how do you explain that Mr. Moore put in a certain proportion of that capital?

A. The African Pacific and Indian Hagey Company papers recited that each one's interest was a certain amount, and at that time I was not so well acquainted with Mr. Moore, Cowert, and Kirkpatrick as I was afterwards and I took it for granted that it was right.

Q. But you knew that Mr. Moore at that time was in Australia?

A. He was not here, he was away.

Q. Was not here?

A. No.

Q. Did Mr. Moore ever sign his name to any papers of the copartnership in this Company?

A. Not to my knowledge. I know that he refused to sign everything generally.

Q. He was solicited to sign was he not by Cowert and Kirkpatrick?

A. Yes, sir.

Q. And refused to sign?

A. Refused to sign any document.

Q. Never signed anything?

A. Never signed anything.

Q. Never signed the document in this case?

A. No.

Q. And refused to sign?

A. He had capital——

106 Q. And yet he was one of the supposed partners in the African Pacific and Indian Hegey Company?

A. Yes.

Q. The consideration of this contract you say was a sheep run with some sheep?

A. Yes, sir.

Q. And it was put in your name simply as a matter of convenience?

A. Convenience of sale, yes, sir.

Q. The sheep belonging to the Company?

A. Belonging to the company.

Q. And not to you?

A. Not to me.

Q. Who were the sheep bought for, the Company, or traded in this matter for the Company?

A. They were traded for the Company.

Q. What did you do with the sheep and the run?

A. Sold them.

Q. How soon after the trade?

A. It was not a great while. I can tell by referring to that little book, but I cannot give the exact date without it.

Q. Well refer to the book please?

A. On or about October 12th, that is when I received the first payment, October 12, 1897.

Q. The contract was signed on October 1st?

A. Well, it was between October 1st and October 12th, that I was negotiating to sell and dispose of them, and I received a payment on October 12th.

Q. How much did you sell them for?

A. 500 Pounds.

Q. And you sold them for 500 Pounds, all that you receivd in the trade from Harrison?

A. Yes, sir.

Q. At or about the time of this contract did you know or learn the market value of those sheep or the value of them?

107 Objected to as irrelevant and immaterial.

Mr. McCLANAHAN: If we can show that the Company had no stock of the market value of 2,000 Pounds, or any other stock at all,—in other words, that there could be no specific performance of this contract, then it comes down to the payment of 2,000 Pounds in lieu of specific performance of the contract.

Objection overruled. Exception.

(Last question read.)

Objected to as hearsay.

Objection overruled.

A. Upon getting the papers the title of the sheep passed to me.

Q. Upon what?

A. Upon getting the bill of sale, so that I had a right to sell them, I immediately started out to dispose of them, to convert the sheep into money, and I did so by making inquiry of commission merchants and people who were likely to give me any information or put me on track of any sale, who lived adjacent to parts where the sheep were, having got the address of these people from Mr. Harrison.

Q. Having got what?

A. I got the address of these people that lived near the location, the place where the sheep were located, I got the address, Mr. Harrison kindly gave it to me. I wrote to them, and also asked Mr. Harrison if he could help dispose of them, and I made inquiry of the two largest firms, butcher firms or dealers in meat, etc., in Auckland, New Zealand, and found out that they were so far from Auckland it was impossible to get them there.

Mr. ROBERTSON: I have to interrupt and move to strike
108 out the answer of the witness on two grounds: first that it is irresponsive to the question; and second, that it is merely heresay so far as witness is concerned. It is absolutely incompetent.

The COURT: I think the motion to strike out should be granted, and it is so ordered.

Mr. MAGOON: Exception.

Mr. MCCLANAHAN:

Q. You say you sold these sheep for 500 Pounds?
A. 500 Pounds.
Q. Did you sell all you got from Harrison for 500 Pounds?
A. I did.
Q. Sheep run and everything. Who did you sell them to?
A. I pronounce it Robertson, but in that country they call it Robaison.
Q. Did you know who Robaison was at that time?
A. A gentleman who had been interested with Mr. Harrison and as a partner who had a sheep run adjourning or close to the sheep run.
Q. Was he interested in these sheep?
A. Not at that time.
Q. But had he been?
A. He had been interested as a partner with Mr. Harrison.
Q. In these sheep?
A. In these sheep.
Q. And that is the man that you sold them to?
A. That is the man that I sold them to.

The COURT:

Q. Was Mr. Harrison's interest merely a partnership interest in the sheep?
A. I know he had bought out Mr. Robertson, or Robaison, as they call it.
109 Q. Did you ever see the sheep?
A. Never did.
Q. Is that the same person that signed his name as a witness to that contract?
A. No.

Mr. MCCLANAHAN:

Q. When were these sheep sold?
A. 10th of October first payemnt was made.
Q. How much money was paid at that time?
A. 500 Pounds down.
Q. What became of that 450 Pounds?
A. Well that was paid later.
Q. When was that paid?
A. There was a note taken for the 400 and that note paid 21st of January, just a few days before I went away.
Q. First of January, 1898?

A. 21st, yes.
Q. 21st?
A. 21st.
Q. How much was the note for?
A. When it was paid it was $472.10——
Q. 472 Pounds?
A. $472.10, 10 shillings—the 22 Pounds and 10 shillings was interest.
Q. So you took 50 Pounds in cash and a note for 450 Pounds.
A. A note for 450 Pounds.
Q. And the note was paid on the 21st of January, 1898?
A. Yes.
Q. When Mr. Harrison went to Sidney, you sent him this letter with the instructions and also a remittance?
A. I sent him the letter and a remittance. Whether the letter of instructions—I think Mr. Cowert or Kirkpatrick mailed that. It is under separate cover.
110 Q. This remittance was for 110 Pounds was it not?
A. Less amount taken out for medicines.
Q. Letter dated October 12th, 110 Pounds. What was this 110 Pounds for?
A. It was our proportion of the fund that was established similar to the fund that was established by the partners when we left Honolulu.
Q. How much was the whole fund?
A. I could not say, that was our proportion, and they was to put up an amount in proportion to what their interests were.
Q. Who do you mean by "our?"
A. The balance of us persons other than Mr. Harrison and Mr. Gilmore and other persons.
Q. And they, Harrison and Gilmore, were to put up the balance in proportion?
A. Their proportion.
Q. So that at the date of this remittance to Harrison of 110 Pounds you had received only 50 pounds on the sheep run sold?
A. That is all, the note had not been paid yet.
Q. So that at that date you were really out 60 in cash on the trade from Harrison?
A. We paid more money up to that date than we had received on it.
Q. What?
A. We had paid out more than we had received on it.
Q. Was this dividend which was paid or which was declared of 18 per cent., declared before the 450 pounds became due and was paid?
A. Yes, sir, it was declared on October 30th, 29th or 40th.
Q. So that although this 50 Pounds had been received from Harrison you had paid out 110 Pounds on Harrison's contract?
A. Yes, sir.
111 Q. When the dividend was declared of 18 per cent.?
A. Yes, sir.

Q. How was this fund to start the Hobart business, Tasmania business, how was that decided upon, who decided it, the amount of it?

A. That was arranged between Mr. Cowert and Mr. Kirkpatrick as our managers, between Mr. Gilmore and Mr. Harrison.

Q. It was arranged between Cowert, Kirkpatrick, Gilmore and Harrison?

A. Yes, the amount of it.

Q. The amount of it?

A. Yes.

Q. Did you have anything to do with it?

A. I paid over our proportion.

Q. But I mean the arrangement of it?

A. No, I had——

Q. Settling of the amount?

A. Nothing to do with it.

Mr. ROBERTSON: I object to that as incompetent, irrelevant and immaterial and move to strike the answer out.

Motion denied. Exception.

Mr. MCCLANAHAN:

Q. Now you say, to the best of your knowledge and belief, all of the copartners of the African Pacific and Indian Hagey Company shared in this 18 per cent. dividend?

A. Yes, sir.

Q. How did you pay George D. Moore's dividend?

A. Paid to Mr. Cowert, I think Cowert receipted for it.

Q. You had no communication with Mr. Moore about the dividend?

A. No, he was not there.

Q. How is that?

A. He was not there at the time.

Q. How did you happen to pay to Mr. Cowert, because he wanted you to?

A. Mr. Cowert, as a matter of fact, paid it himself, he held
112 the money and give me what I was entitled to, for myself, I could not get my hands on it but he receipted for it, which, as far as the accounts were concerned, amounted to the same thing.

Q. So you don't know that Moore ever got the money?

A. I don't know whether he ever got it or not any more than I never heard he didn't get it.

Q. This dividend then as a whole was never in your hands?

A. No, sir.

Q. Whose hands was it in?

A. Mr. Cowert.

Q. And I understand he paid you your dividend and the dividend for your Honolulu copartners?

A. For Mr. McStocker?

Q. For Mr. McStocker?

A. Yes, sir.

Q. And that is all that you had to do with the money?

A. And the balance I took, I took his receipts for all of the money so as to balance my cash.

Q. But you never handled the money?

A. I did not.

Q. How was this dividend of 18 per cent. made up, what was it made up from?

A. It was declared from money in our hands at that time.

Q. What did the moneys—What sources did they come from?

A. Well, here is the cash book.

Q. Well, refresh your memory and tell us if you can?

A. I can't tell which individual—every individual dollar or pound or shilling, but the bulk of it came from the New South Wales territory.

Q. How much was the New South Wales territory sold for?

A. I don't remember the amount. I can tell the amount that should come into my cash book at that time. Here is the
113 entry of 4500 Pounds on October 30th, the same time the dividend was paid.

Q. Don't you know independently what the New South Wales proposition sold for?

A. My impression was 5000 Pounds.

Q. 5000 Pounds?

Mr. Robertson: We object to the question and move to strike it out.

The Court: It is so ordered.

Mr. McClanahan:

Q. What is your best recollection as to what it sold for?

A. 5000 Pounds. There is 4500 of it received there.

Q. Will you examine your—Can you state when the balance was received, if there was any receipt for the balance?

A. That is all I see here, everything that was received in my time as far as I could—that come to my knowledge, was on the books.

Q. Did you receive this 4500 Pounds?

Q. I received portion of it.

Q. Now answer the question, Mr. Ables?

A. No.

Q. Did you receive the 4500 Pounds?

A. No, I didn't actaully handle the money.

Q. What portion of the 4500 did you receive, actually handling the money.

Objected to as irrelevant and immaterial.

Objection overruled. Exception.

A. My cash was always correct. I either had the money or receipts, but as I have explained that in these dividends other than mine and Mr. McStocker's, why they gave me the receipts, as having received it, in lieu of the money. I didn't hold the money
114 but I had their receipts, but it was on the same day, to make my cash balance.

Q. Well, can you state what part of this 4500 Pounds you received in cash at any time?

A. Well, it would leave a difference between the two sides of the cash book, the dividends were paid the same day the entries were made of that 4500 Pounds.

Q. The dividends were what?

A. It was all one transaction, I entered what was received on one side and what was paid on the other.

Q. What is the date of that credit there 4500?

A. October 30th.

Q. October 30th, the same day the dividend was declared?

A. The same day.

Q. As a matter of fact, Mr. Ables, was not the dividend declared from the 4500 Pounds?

A. We could not have paid that dividend if we had not had that 4500 Pounds.

Q. Answer the question if you can; was it not as a matter of fact paid from the 4500 Pounds?

A. That was the 4500 Pounds that paid the dividend, that was the money.

Q. How much was the gross amount of the dividend?

The COURT:

Q. The aggregate amount paid out in dividends?

A. It is on that journal entry we had here this morning. I can't tell from that receipt because in addition to the dividend there is that money that was refunded, but I have got a journal entry here that will tell what it was. Here it is, 3780 Pounds.

Q. 3780 Pounds the gross amount of the dividend, and that was paid on the day of the receipt of the 4500 Pounds from the
115 New South Wales sale?

A. Yes, the same date.

Q. On the date of the payment of the dividend had you received anything from Harrison, the plaintiff, under this contract, any money other than the 50 Pounds?

A. No.

Q. And at that date you had paid out on account of that contract 110 Pounds?

A. 110, the same date.

Q. You have spoken Mr. Ables of there being two or three contracts, or drafts of contract?

A. Yes, sir.

Q. Why were there two or three contracts?

A. Well it was an arrangement of Mr. Cowert's and Kirkpatrick's Mr. Gilmore and Harrison made the arrangement of the terms of the contracts; they were very similar.

Q. Is this contract which is in evidence the contract which you signed, does it contain the provisions that you signed?

A. The contract that I saw had my signature on it.

Q. I know that. I am speaking now of whether or no this contract which is in evidence with your signature on it, contains the conditions as they appeared on the contract when you signed it?

A. I contend they do not. I so swore in the last trial and so swear again. There is an alteration there.

Q. Will you take contract as introduced in evidence, the plaintiff's Exhibit "C" and state what was not in that contract when you signed it that appears in the contract there?

A. This interlining here in the fourth paragraph "at or before."

Q. "At or before" in paragraph 4 of that contract?

A. Yes, sir.

Mr. ROBERTSON:

Q. Interlined you say?

A. It has got a lead pencil mark under it.

116 Mr. MCCLANAHAN:

Q. What words do you say "at or before"?

A. Yes. So as to make it, it was to be six months instead of at or before.

Q. The contract you signed then was a contract which required Harrison to give it a trial for six months?

A. Six months.

Mr. ROBERTSON: I object to it on the ground that it is not the best evidence and move to strike it out.

The COURT: The motion is denied.

Mr. ROBERTSON: Exception.

Mr. MCCLANAHAN:

Q. Did you ever send to Mr. Magoon a copy of the contract that you did sign?

A. No, I did not.

Q. Did you ever send to him any contract that you signed with Mr. Harrison?

A. I don't think I did. If I have I never remember of doing so.

Q. Did you ever advise Mr. Magoon that you had signed a contract with Mr. Harrison?

A. No, I did not to the best of my knowledge and belief.

Q. Did you ever advise Mr. McStocker that you had signed a contract with Mr. Harrison?

A. I don't think I did.

Q. Did you ever advise Mrs. Emerson that you had signed the contract for her with Mr. Harrison?

A. I don't think so, I never did, I never wrote to Mrs. Emerson at all.

Q. Never what?

A. I never had any correspondence with Mrs. Emerson.

Q. Did you ever advise either Mr. Magoon, Mr. McStocker or Mrs. Emerson either in writing or verbal that you had signed a contract with Mr. Harrison?

A. I don't remember. If I have I have forgotten it.

117 Q. Do you know whether either of these three defendants ever knew that you had signed a contract with Mr. Harrison before the bringing of the Tasmanian suit?

A. The reference that I made to the contract there is all that I remember about.

Q. I call your attention to the fact that there is no reference to your having signed a contract in that?

A. I don't remember ever stating the fact of the contract.

Q. Did you ever advise either *three of these* defendants, Magoon, McStocker and Emerson, that Mr. Harrison had the power on or about 6 months from the date of his departure for Tasmania to become dissatisfied with the conduct of the Hagey business in Tasmania?

A. I did not.

Q. And demand from the Company stock of the market value of 2000 Pounds in some other field of the Company's field of operation?

A. I did not.

Q. Did you ever advise either of these three defendants Magoon, McStocker or Emerson that you had formed a partnership with Harrison?

A. I did not.

Q. Or with Mr. Gilmore?

A. Not——

Q. Or Gilmore or Harrison?

A. Not to the best of my knowledge and belief.

Q. Did they know prior to the summons in the Tasmanian suit that there had been a partnership formed?

Mr. ROBERTSON: I object to that as incompetent, irrelevant and immaterial and not within the province of this witness to testify.

Objection sustained.

118 Mr. ROBERTSON:

Q. Did they ever know to your knowledge or from anything that you have done or said that there was such a partnership?

A. Not to my knowledge.

(Here the Court after the usual statutory admonition to the Jury adjourned until tomorrow morning at 9:30 o'clock.)

119 In the Circuit Court of the First Circuit, Territory of Hawaii.

T. M. HARRISON
vs.
J. A. MAGOON ET AL.

OCTOBER 30, 1903.

Cross-examination of L. C. ABLES resumed.

Mr. MCCLANAHAN:

Q. I understand, Mr. Ables, that you returned to Honolulu sometime in March, 1898, and that at your return you had a talk with Mr. McStocker and Mr. Magoon relative to the status of the part-

nership affairs. Will you tell what matters relating to the partnership in this conversation you talked about?

A. My memory serves me that I talked more particularly about the financial affairs than about the conduct and relations of myself with Mr. Cowert and Mr. Kirkpatrick, the managers, that was the gist of the conversation, the management of the affair from the time we started until I got back, how we got along together.

Q. Why did you not talk about the Harrison matter?

A. Well it was a matter that was closed up, there was no occasion to talk about it, pau.

Q. Did you at that time consider that you were bound to guarantee the $10,000?

Mr. ROBERTSON: I object to the question on the ground that it is irrelevant and immaterial, it would be simply a conclusion of the witness as to his legal liability in the premises, a conclusion of law.

Objection sustained. Exception.

Mr. MCCLANAHAN:

Q. What were your reasons why you did not speak of it?

120 A. I——

Mr. ROBERTSON: I object to the question as irrelevant and immaterial.

Objection sustained. Exception.

Mr. MCCLANAHAN:

Q. You have stated that you made a report to McStocker and Magoon. At this time why didn't you report about the Harrison contract.

Mr. ROBERTSON: I object to the question on the ground that it has already been answered.

Objection sustained. Exception.

Mr. MCCLANAHAN:

Q. All of the notification or notice of this Harrison transaction Mr. Ables, that Mr. McStocker had prior to your coming here, was conveyed in letters, was it not, passing from you to him, was it not?

A. Yes, sir.

Q. Some of these letters have been introduced in evidence?

A. Some of them have.

Q. Can you state whether those letters are all the letters that were written by you which touched upon the Harrison matter?

A. I can't remember exactly what I wrote. The letters speak for themselves. Mr. McStocker has them. I don't remember any others.

Q. Is this one of the letters which you wrote prior to your departure for Tasmania to Mr. McStocker.

A. This is one of the letters which I wrote to Mr. McStocker.

Mr. MCCLANAHAN: I offer this in evidence for the purpose of proving practically a negative that it is one of the letters in the chain of correspondence that passed between Mr. Ables and Mr.

121 McStocker, and it is offered for the purpose of showing the whole chain of correspondence, for the purpose of showing

the whole of the notification, if any, that was made by Mr. Ables to Mr. McStocker.

Mr. ROBERTSON: I object to the evidence on the ground that it is irrelevant and immaterial and hearsay and not proper cross examination and is not bearing upon any matter brought out upon the direct.

Objection sustained. Exception.

Mr. MCCLANAHAN: I would like to have the paper received and marked for identification.

The COURT: It may be marked for identification as Defendants' Exhibit "1."

Mr. MCCLANAHAN:

Q. Is that a letter which passed from you to Mr. McStocker prior to your departure from Australia?

A. Yes, sir.

Mr. MCCLANAHAN: We offer this letter in evidence as a part of the chain of correspondence and in connection herewith we offer to show the whole of the correspondence passing between Mr. Ables and Mr. McStocker, for the purpose of showing the whole of the notice that was conveyed by these letters, of the Harrison contract. The letter is dated S-ptember 2nd.

Mr. ROBERTSON: We object to the evidence on the ground that it is irrelevant and immaterial and having nothing whatever to do with this case, and hearsay, because communication or correspondence between McStocker and Ables are not evidence against Harrison.

Objection sustained.

122 Mr. MCCLANAHAN: I ask that the letter of S-ptember 2nd 1897 be received for identification and marked for identification.

The COURT: It may be marked as Defendants' Exhibit "2" for identification.

Mr. MCCLANAHAN:

Q. Is this, Mr. Ables, one of the letters written by you to Mr. McStocker before you left New Zealand?

A. It looks like, may be two or three—This is my writing, this is all my writing.

Q. Answer the question?

A. Yes.

Q. Is that your letter?

A. Yes, sir.

Q. One of the letters you wrote to McStocker before you left New Zealand?

A. These are all my letters.

Q. What is that?

A. That is my letter.

Q. To McStocker before you left New Zealand?

A. To McStocker.

Mr. McCLANAHAN: We offer this in evidence if the Court please for the same purpose that we offered Exhibits 1 and 2.

Mr. ROBERTSON: We object to this letter on the ground that it is hearsay, if the Court please and being a communication between McStocker and Mr. Ables which is not admissible against this plaintiff. It is hearsay and inadmissible.

The COURT: I think the objection on the ground that it is hearsay should be overruled and it is so ordered.

Mr. ROBERTSON: Exception.

The COURT: Let the letter now offered and read in evidence be received and marked Exhibit "3."

Mr. ROBERTSON: Did you read October 1st?

123 Mr. McCLANAHAN: September 30th.

Mr. ROBERTSON: There appear to be three letters there, there are three different documents here, if the Court please—August 31, one dated October 1st and one dated September 30th.

The COURT: My ruling was intended to apply only to that letter that touched upon the Wolvington matter.

Mr. ROBERTSON: We have a further objection to the letters of August 31st and October 1st, in that they are irrelevant and immaterial and improper cross examination.

Objection overruled. Exception.

(Mr. McClanahan reads Defendants' Exhibit "3" to the jury.)

Q. Will you please tell me if that is a letter that you wrote to Mr. McStocker prior to your leaving New Zealand with reference to the partnership business?

A. Yes, sir, that is my letter, dated the 26th November.

Mr. McCLANAHAN: I offer in evidence letter dated 26th December.

A. 26th November.

Mr. McCLANAHAN: November, 1897, from the witness, L. C. Ables to F. B. McStocker, on the same ground that the offer was made of Exhibits 1 and 2.

Mr. ROBERTSON: We object to the evidence on the ground it is irrelevant and immaterial, bearing upon no issue in this case and hearsay, because a communication between Ables and McStocker, and not proper cross examination. It doesn't relate to anything brought out on the direct.

Objection overruled. Exception.

The COURT: Let the letter accompanying statement or

124 trial balance be received in evidence and marked Defendants' Exhibit "4."

Mr. ROBERTSON: We offer a further objection to the reading of the letter on the ground that the trial balance is a thing as wholly complete in itself and is no part of the letter, that by itself is wholly complete; that even if the trial balance is admissible it doesn't make the letter admissible.

Objection overruled. Exception.

(Mr. McClanahan reads Defendants' Exhibit 4 in evidence.)

Q. Mr. Ables, these last items that we read, opposite the names

of these different parties, are those patients and receipts from patients?

A. They are what they owed at the time.

Q. Yes, but they are patients?

A. They were patients and amounts due from them.

Q. Who is that C. and K. referred to in this letter?

A. Cowert and Kirkpatrick.

Q. And J. A. M. is Mr. Magoon?

A. J. A. Magoon.

Q. When you say "We have had no fights lately" who do you refer to?

Objected to as irrelevant and immaterial and not proper cross examination.

Objection sustained. Exception.

Mr. McClanahan:

Q. In that letter who do you refer to when you speak about as "they"?

A. I could not answer that question without having the sentence read, I might speak of one party one time, and another, another.

125 Q. "The project which they got into and the one I would not sign"?

A. Mr. Cowert.

Mr. Robertson: I object to the question on the ground it is irrelevant and immaterial and move to strike the answer out as not proper cross examination.

Motion denied. Objection overruled.

Exception.

A. At first, Mr. Cowert and Kirkpatrick, the managers.

Mr. McClanahan:

Q. Plaintiff's Exhibit "D," letter from you to McStocker, dated October 2nd, reads as follows: "Dear Mac: At the last moment Col. Moore has decided to go to Honolulu and Texas. He will put things to you as they are." Put what things to you as they are?

A. I was referring to the condition of affairs as they existed at that time.

Q. Detail what they were?

A. Conditions that we were working under.

Q. Detail what they were?

A. Well it was with reference to the way Mr. Cowert and Mr. Kirkpatrick had taken things into their own hands and carrying on the business, from the fact that they had control of the stock they conducted the business as far as the business was concerned, the details of going into—they did it themselves, they had a majority and they carried it on in that line, they kept a great many of the facts, I considered, from us relating to these things, and they were disagreeable to me, in fact, so much so that we come to a clash; these matters—in fact, they had boasted to me that they had soured

Mr. Magoon on me and that he was to ask for my resignation and had been writing to McStocker putting these things to him,
126 and I concluded that Mr. Moore could relate the facts, he being on the ground there and knowing the conditions that we had, he could relate them better than I could refer to those things, the general extent of the business, the country, and the condition under which we were trying to do business.

Q. In the letter of October 29th being Exhibit "E" of the Plaintiff you say "I have got myself badly disliked with the parties here." Who do you mean by the parties here?

A. Mr. Cowert and Kirkpatrick.

Q. In the same letter you say there is no denying the fact that I am the one who is in the way and that I am the one they want to down if possible. Who do you refer to there?

A. Mr. Cowert and Kirkpatrick. I didn't approve of their way of doing business.

Q. Mr. Ables, when you sold these sheep and this sheep run for 500 Pounds, did you get all you could for it?

Objected to as irrelevant and immaterial and not proper cross examination.

Objection sustained. Exception.

Re-direct Examination of L. C. ABLES.

Mr. ROBERTSON:

Q. When did you say you received the 250 Pounds from Gilmore?

A. I can't give you the date. I will have to ask permission to refer to that book. The book shows.

Mr. MCCLANAHAN: I don't see how this is re-direct. It
127 is not material.

Objection overruled. Exception.

Mr. ROBERTSON:

Q. Answer the question please. The question was when.

A. The 250 Pounds was paid Mr. Gilmore 22nd day of September, 1897.

Q. And when was the first time you realized from the sheep?

Objected to as improper and not re-direct examination.

Objection overruled. Exception.

A. October 12, 1897, 50 Pounds the first payment.

Q. October what?

A. October 12, 1897.

Q. And the balance of the sheep?

A. January 21, 1898.

Q. Mr. Ables, do these dates that you have given here of the actual receipt of the money, represent the dates at which the items were placed to the credit of *the credit of* the territory, or was the whole amount placed to the credit of the territory before the cash was actually received.

A. I credited nothing, this is all through the cash book, I credited no cash until I actually received it.

The COURT:

Q. The receipts——

A. I didn't credit any cash until I received it. This is the day I received it.

Mr. ROBERTSON:

Q. Well can you tell them what items made up this item credit to territory on the trial balance of October 31, 1897, 5190 Pounds?

A. I would have to go over the books to figure it out. I charged territory with expense.

128 —. I refer to this item 44, territory, 5120, trial balance October 31, 1897?

A. I would have to state that I have not got a copy of the books as posted. This is a copy of the cash received. I would have to go over the books and post them from the time of the first receipts and charge up what was paid out, you understand, in order to arrive at that balance. This is a copy of the cash book, It is not a copy of the ledger, a copy of the trial balance.

Q. You have no copy of the ledger?

A. No, I could run through the account and take the debits and credits and I could satisfy myself as to that time, because the trial balance was always correct, just what particular items, you understand I have not a copy of the ledger; I cannot turn to the territory account; I did not copy the ledger, I copied the trial balance off each month in this book, and this is a copy of the cash book, cash received and cash paid out.

Q. When this agreement was made with Harrison and he transfer- to you his sheep run and sheep, didn't you credit anything to territory?

A. I did not, not until I got the money; I only credited the cash.

Q. Then you mean to say upon receiving the run and the sheep from Harrison, no asset to that effect appeared in the books of the Company?

A. It was sold a short time after—No there was no entry made opening up an account crediting up the sheep ranch.

Q. Well, when was the sale made?

A. To—Of the sheep?

Q. To Robaison, yes?

A. I can't tell positively what day it was made. I can tell the day the first payment was made.

129 Q. Well, was the sale made prior to the first payment?

A. Yes, there was an agreement before he paid anything down. The sheep was sold to him. He didn't pay anything on account until he had agreed to take the sheep.

Q. Well, did he give a note for the 450 Pounds?

A. He gave the note for the 450 Pounds?

Q. Well then the credit appeared upon your territory account when he gave the note didn't it?

A. I don't think so, no.

Q. It should have, should it not?

A. Not necessarily, it is just a matter of book-keeping.

Q. Even from the standpoint of book-keeping, when you received the note, it becomes an asset and should appear to the credit of some account, should it not?

A. That is customary in the mercantile business when you receive goods, receive a man's note, to make an entry right there, that is customary book-keeping.

Q. If there is no entry made then the books are incomplete, are they not?

A. Well, I should say the property of the Company, it was kept in the Company's effects, there was no secret about it, it was known there was a note, and as soon as the note was paid it went into the cash account. It did not go into the cash account until it was paid.

Q. If the books of the Company don't show all the assets of the Company they are incomplete are they not?

A. There are no other transactions, they did not show the assets, the truth of that did not appear on the trial balance until after January 1st, the trial balance did not show that we had that note.

130 Q. I would like you to find out for me, Mr. Ables, what this 5190 Pounds is made up of?

A. I can figure it out for I dare say but it will take some little time, because I would have to post the territory account clear through all this book, a person that understands books would realize that it would take a little time.

Q. How long would it take you.

A. I wouldn't like to say.

Q. Two hours?

A. I can do it in two hours. Give you the debits and credits and show you how I arrive at that balance. That is what you want to know?

Q. Yes?

A. At that date.

Mr. ROBERTSON: I would like to have that evidence if your Honor please.

Mr. MCCLANAHAN: Does the witness understand clearly what is wanted?

A. I do.

The COURT: Will you post up your books? Enough of it, sufficient of it, the territory accounts at least in order to show how that account is obtained?

A. I will make a statement of it.

Mr. ROBERTSON:

Q. Does that book show the different amounts received from territory?

A. It shows all the amounts I received and paid out on account of the different territories.

Q. Then it shows what the money is received for?

A. Yes, I have got it.
Q. Was New Zealand and New South Wales shown in that book?
A. Every item in this book for territory shows from whence it came.

131 The COURT:

Q. You will prepare that statement, will you Mr. Ables?
A. I will.
Q. You have stated that on arriving in Honolulu you did not talk to your copartners about the Harrison agreement because it was closed; did any of your partners refer—did any of your partners refer to the Harrison agreement?

Objected to as improper re-direct examination.
Objection sustained. Exception.

Mr. ROBERTSON:

Q. You have stated that the letter in reference to McStocker that Col. Moore would explain things, you have said that those things meant the financial affairs and your relations with Cowert and Kirkpatrick, and would also include the transaction with Harrison?
A. I don't think I ever said or intimated that Mr. Moore would explain the financial affairs so much as he would the details that we had and the status of the business there, because I kept the partners thoroughly posted on financial affairs better than Mr. Moore could have done it. I certainly never said that.
Q. You stated this morning that that was one of the things that you referred to in your letter here that Mr. Moore was going to discuss?
A. The financial parts that he could explain, could not have been any more complete than I would explain it in my statement.
Q. Referring to these things that you have referred to that Mr. Moore was going to explain to the people here in Honolulu, was the Harrison agreement included?
A. I don't think so. I never anticipated any occasion for referring to that, it was more particularly the New Zealand transaction, that is the one that brought the trouble.
132 Q. The New Zealand transaction?
A. Yes, sir.
Q. That brought about the disagreement between you partners that were down there in New Zealand?
A. That brought the trouble between us immediately after we went there.
Q. You had no trouble with each other over the Harrison agreement?
A. No, I don't think we ever had only words about that at all.
Q. And the value of Harrison's sheep cut no figure as far as the agreement being satisfactory to the Company was concerned, did it?
A. That was talked over amongst us the value of the sheep.
Q. And was satisfactory to you all there?
A. We did not care what the sheep were worth, it was to be 2000

Pounds simply as a matter of putting in something. Mr. Harrison insisted. We should have put in 5000 Pounds just as well.

Q. And whatever they were worth was satisfactory to you under the terms of the agreement?

A. Yes, sir, we had made a contract then like trading jack-knives, sight unseen.

Q. You traded a pig in a poke for another pig in another poke?

A. That is about the size of it, both got cheated I guess.

Q. When you returned to Honolulu did you bring any effects or property of the partnership with you?

A. Nothing whatever.

133 Recross-examination of L. C. ABLES.

Mr. MCCLANAHAN:

Q. What were those sheep worth?

Mr. ROBERTSON: I object to the question on the ground it is irrelevant and improper.

Mr. MCCLANAHAN:

Q. You say whatever they were worth was satisfactory to you. What were they worth?

Mr. ROBERTSON: I object to that on the ground it is irrelevant and immaterial and not within the knowledge of this witness. Objection sustained. Exception.

Direct examination of Mrs. DORATHEA EMERSON, Called for Plaintiff, Sworn.

Mr. ROBERTSON:

Q. Were you a partner in the African Pacific and Indian Hagey Company, Mrs. Emerson?

A. I was.

Q. Being the Dorothea Lamb referred to in the Partnership Articles?

A. Yes, that was my name formerly.

Q. State whether or not you gave Messrs. Cowert and Kirkpatrick a power of attorney to act for you?

A. Yes, I did.

134 Q. Have you the original of that power of attorney?

A. No.

The COURT:

Q. Where is the original, Mrs. Emerson, do you know?

A. I don't know where it is.

Q. To whom did you deliver it?

A. I think Mr. Cowert or Mr. Kirkpatrick took it.

Mr. ROBERTSON:

Q. I will ask you if you recognize this as a copy of it?

A. Well, I don't like to swear that this is a copy of it; I believe it to be a copy.

Q. Do you remember the date of the power that you gave Cowert and Kirkpatrick?

A. No, but I think it was the year they started for Honolulu—Australia.

Q. You knew Mr. Magoon signed the same power of attorney, did you not?

A. Yes.

Mr. ROBERTSON: I offer this in evidence.

Mr. MCCLANAHAN: We object to it if the Court please on the same grounds we objected to the exhibit of plaintiff's Exhibit "B," being the power of attorney from Mr. McStocker to Mr. Ables, and on the further ground that it is cumulative. Partnership powers are no less than or more than are granted under the power of attorney at the time.

Objection overruled. Exception.

The COURT: It may be received in evidence and marked Plaintiff's Exhibit "J."

(Plaintiff's Exhibit "J" read in evidence.)

Q. After Mr. Ables and Cowert and Kirkpatrick proceeded to New Zealand, did you receive any information from either of them in regard to their entering into a transaction with a man by the
135 name of Wolvington?

A. Mr. Kirkpatrick did write same something about Dr. Wolvington.

Q. He wrote you something?

A. Yes, sir, he did.

Q. I will ask you to look at this letter, and see if you identify it as having been received by you from Cowert and Kirkpatrick?

A. Yes, I think I do. Yes, that is the letter I received.

Mr. ROBERTSON: I offer this in evidence if the Court please.

Objected to as irrelevant and immaterial and hearsay.

Objection overruled. Exception.

The COURT: It may be received in evidence and marked Plaintiff's Exhibit "K."

(Plaintiff's Exhibit "K" read in evidence.)

Mr. MCCLANAHAN: What is the date of that, Mr. Robertson?

Mr. ROBERTSON: October 30, 1897.

Mr. ROBERTSON:

Q. This letter says it encloses drafts in favor of Mr. Magoon for 466 Pounds and 4 Pence, less exchange rate, being a rebate on original assessment, and 18 per cent. dividend. State whether or not you delivered the enclosed draft to Mr. Magoon?

A. I delivered it.

Q. This letter also says that Cowert and Kirkpatrick have already written with reference to this Dr. Wolvington. Have you any prior letter than this referring to Dr. Wolvington?

A. I don't remember that the letter was to me personally. There

was a letter that did refer to Dr. Wolvington but I don't remember whether it was — me or whether it was to Mr. Magoon. The Letters always came to us together, and we answered them together.

136 Q. And any letter that was addressed to you was read equally by Mr. Magoon?

A. Yes, sir.

Q. Any *any* letter from them addressed to Mr. Magoon was read by yourself?

A. It was.

Mr. ROBERTSON: I ask counsel to produce that letter to Mr. Magoon or Mrs. Emerson prior to October 30th referring to Dr. Wolvington.

Mr. MCCLANAHAN: We have not any other than those that were introduced.

Mr. ROBERTSON:

Q. Do you recollect Mrs. Emerson what was said in this letter referred to by Cowert and Kirkpatrick about Dr. Wolvington?

A. It seems to me that they said that this Dr. Wolvington was down there preaching the cause of temperance, and they thought it was better to get him in with them rather than act independently, and so he had joined them in the Hagey Co.

Q. Did they inform you on what terms he had joined the Hagey Company?

A. I don't remember that they did.

Q. Do you remember ever any—I will ask you at about this time that you are referring to did you see or have access to trial balances of the Company's books sent up here by Mr. Ables?

A. I never saw and never heard anything about trial balances until this morning in Court. We were always asking for them but they never came to us.

Q. Did you ever ask Mr. McStocker to see his?

A. No, I did not know—no, I feel pretty sure that I did not, I did not know that he had received any.

Q. This letter says here "Mr. Ables will send you a statement of the business." Do you remember seeing that statement?

137 A. He never sent me one. I never had any communication with Mr. Ables.

Q. Did Mr. Magoon, do you know?

A. No, I am quite sure he had not.

The COURT:

Q. If there had been one sent to Mr. Magoon would you have seen it?

A. Yes, I would have seen it.

Q. But you did not see it?

A. No, I did not see it.

Mr. ROBERTSON:

Q. Don't you understand this passage in this letter Mrs. Emerson referring to the contract, to Mr. Magoon, of the sum of 466 Pounds

and 4 Pence, less exchange which you will please deliver to him, 61 Pounds on the original assessment, and 405 Pounds on Stock, 18 per cent. was paid on the stock, and Mr. Magoon's $12,500 investment was reduced 10 per cent. the same as yours and all the rest there, the 1/10 interest go over to Dr. Wolvington that we have written about,—don't you understand that to mean that Wolvington received a 1/10 interest in the business?

A. I understand that it now means yes, it should. I don't know that I took much notice of it at the time.

Q. You don't recollect this particular passage in glancing over the letter?

A. I don't understand you. Do you mean what I think this minute.

Q. No, when you had the letter in your hands?

A. When I first received it?

Q. No, this morning when you first looked at it?

A. Oh, just now?.

Q. It didn't refresh your memory in that respect?

A. Yes.

138 Q. But you understand now that that is what it was?

A. Yes, I understand now that that is what it was.

Q. And it is so clearly stated that you must have understood it when you first received the letter from Cowert and Kirkpatrick, was it not?

A. Yes, I suppose I did so understand it.

Q. I will show you this letter dated October 1st to Mr. Magoon from Mr. Cowert and ask you if you remember seeing it at the time that it arrived?

A. I must have seen it for I saw all the letters.

Mr. ROBERTSON: We offer this in evidence if the Court please.

Mr. MCCLANAHAN: I object to it as hearsay.

Objection overruled.

The COURT: It may be received and marked Plaintiff's Exhibit "L."

(Plaintiff's Exhibit "L" read in evidence to the jury)

Mr. ROBERTSON:

Q. Did you know Col. Moore who was concerned in this Hagey business?

A. A man came here calling himself Col. Moore.

Q. Did you become acquainted with him?

A. I don't call that an acquaintance. He came into the office and I may have spoken a few words to him.

Q. Didn't you know at that time he was interested in the Hagey Company?

A. Yes, I knew he was.

Q. When was it that you first saw him, was that before or after Ables and the others went down to New Zealand?

A. Oh it was some time afterwards.

139 Q. When he came up to Honolulu from the Colonies?

A. Yes, sir.

Q. Did you have any talk with him?

A. I don't think I personally had any talk with him, but I was in the office when he was talking.

Q. Mr. Magoon?

A. Mr. Magoon was there.

Q. About the affiars of the Hagey Company?

A. Yes.

Q. What affiars of the Hagey Company did he refer to?

A. He gave us to understand that Mr. Cowert and Kirkpatrick were not straight, that they were dishonest and they were taking in money from patients and were not paying us our full share.

Q. And in the course of the conversation did he make any reference to this Tasmanian agreement or these sheep?

A. I have not any recollection that he mentioned those arrangements at all.

Q. Did you refer—did either you or Mr. Magoon refer to the Tasmanian contract or the sheep?

A. I don't think we knew anything about them.

Q. Well you remember that was subsequent to the receipt of this last letter that I read, don't you?

A. No, I don't think it was.

Q. Do you know when it was that Col. Moore came here?

A. No, I don't recollect when it was.

Q. Don't you recollect that it was after the beginning of 1898, or early part of 1898?

A. Oh, no, you are quite mistaken, I think, for I was not in the office then Mr. Robertson.

Q. Do you remember that it was in December, 1897?

A. It seems to me that it was before we had received the dividend the end of October.

140 Q. Well, don't you know, Mrs. Emerson, that at the time the agreement was made with Mr. Harrison and Mr. Gilmore in regard to Tasmania, Mr. Moore was at Auckland?

A. How could I know that?

Q. Why don't you know that Mr. Cowert says in his letter——

A. Yes——

Q. Here that Mr. Moore——

A. That he did not sign it, that is so.

Q. Refused to sign?

A. That is so, he did say so.

Q. You remember now that it was subsequent to the agreement with Mr. Harrison that he came up here, don't you?

A. Well, it looks as if it was.

Q. And subsequent to the receipt of this letter which refers to the Tasmanian agreement and the sheep?

A. Yes, I suppose so.

Q. Well, now, do these matters recall to your mind any conversation that you had with Col. Moore or that Mr. Magoon had with him in regard to the Tasmanian agreement or the sheep?

A. No, I don't recollect that that was mentioned.

Q. When did you first see a copy of that agreement between the Hagey Company and Harrison and Gilmore?

A. The first I saw was attached to the summons that was given me.
Q. The summons from the New Zealand Court?
A. Yes.
Q. I will ask you whether this is the summons you received?
A. Yes, that is the one I received, I put the date on it.
Q. Do you remember who delivered it to you?
A. I think young Mott-Smith did, I am not quite sure though.
141 Q. E. A. Mott-Smith?
A. Yes.

Mr. ROBERTSON: I offer this in evidence if the Court please.
The COURT: Any objection Mr. McClanahan?
Mr. MCCLANAHAN: No objection.
The COURT: It may be received in evidence and marked Plaintiff's Exhibit "M."
(Plaintiff's Exhibit "M" read in evidence.)

(Here the Court after the usual admonition to the Jury took a recess until 1:30 P. M.

Afternoon Session.

Direct examination of Mrs. DOROTHEA EMERSON resumed.

Mr. ROBERTSON:

Q. After receiving this New Zealand summons from Mr. Mott-Smith did you have any conversation with Ables in regard to it?
A. No, I did not.
Q. After receiving the New Zealand summons did you communicate with Mr. Harrison at all?
A. I never——

Objected to as immaterial.
Objection overruled. Exception.

(Last question read.)
A. I have had no opportunity of communicating with Mr. Harrison at all, I didn't know him, I didn't know where he was to be found.
Q. What do you mean when you say you had no opportunity of communicating with Mr. Harrison?
A. Why, I mean I could not write him a letter and tell him that I was not responsible or anything of that kind.
142 Q. Why, you were able to address a letter to him, were you not?
A. Why should I have addressed it? New Zealand would be an insufficient address to find him.
Q. Don't you know that he is described in this summons, in several different parts of it as a resident of Auckland? As a matter of fact you did not communicate with him?
A. I did not communicate with him at all.

Cross-examination of Mrs. DOROTHEA LAMB.

Mr. McCLANAHAN:

Q. I call your attention to a sentence in the letter marked Plaintiff's Exhibit "K" reading: "The letters written to Dexter were calculated to do us great harm." I will ask you if these are carbon copies of those letters?

Objected to as irrelevant and immaterial.

Mr. McCLANAHAN:

Q. Not carbon copies; I meant Letter press copies?
Objected to as irrelevant and immaterial.
Objection overruled. Exception.

Mr. McCLANAHAN:

Q. Here is another one?
A. These two are certainly letters to Dexter that I remember. I am just looking through this one.

Mr. McCLANAHAN: We offer in evidence letter identified by the witness as a typewritten copy of a letter sent to the Dexter referred to in the letter Plaintiff's Exhibit "K" dated September 23rd 1897, addressed to Ruby A. Dexter, Auckland New Zealand and
143 signed J. Alfred Magoon and I think it is Dorothea Lamb, yes, Dorothea Lamb.

Mr. ROBERTSON: We object to the letter on the ground that it is irrelevant and improper, it having no relation to any controversy involved in this case, but belonging to matters that are disconnected wholly from this case, on the ground that it is hearsay, being a communication between certain defendants in this case and one by the name of Ruby Dexter entirely hearsay as to this Plaintiff, he not being a party to it in any way, and it not being brought to his attention in any way. And third, that it is not proper cross examination.

Objection overruled. Exception.

(Letter of September 23, 1897 read in evidence.)

The COURT: Letter just offered and read in evidence may be received and marked Defendants' Exhibit "5.")

Mr. McCLANAHAN: We offer in evidence letter dated September 23rd, 1897, addressed to Ruby Dexter, care Dexter & Crozier, Auckland New Zealand, signed J. Alfred Magoon, and identified by the witness as being one of the letters referred to in Plaintiff's Exhibit "K."

Mr. ROBERTSON: We object to the letter being received in evidence on the ground that it is irrelevant and immaterial, in as much as that bears in no way upon any issue involved in this case. Secondly, that it is hearsay as to this plaintiff inasmuch as it is correspondence between one of the defendants and a third party wholly disconnected from any partnership or other transaction in this case; also that it is not proper cross examination.

Objection overruled. Exception.

The COURT: It may be received and read in evidence and marked Defendants' Exhibit "6."

144 (Defendants' Exhibit "6" read in evidence.)

Mr. McCLANAHAN: Can you identify this paper which I hand you as a letter press copy of the enclosure in the letter just read, copy of letter to Messrs. Cowert and Kirkpatrick?

A. Yes, I can.

Mr. McCLANAHAN: We offer in evidence letters dated September 27th, 1897, addressed to Cowert & Kirkpatrick, signed J. Alfred Magoon and identified by the witness as being an enclosure of the letter just read and offered in evidence and received in evidence.

The COURT: This letter last read being Defendants' Exhibit "6."

Mr. ROBERTSON: I object to the admission of this in evidence on the ground that it is irrelevant and immaterial and inasmuch as it has no bearing upon any issue involved in this case, is hearsay as to this plaintiff, being a communication between two persons, of which he had no knowledge and can be in nowise binding upon him; and further that it is not proper cross examination.

Objection overruled. Exception.

The COURT: The instrument offered and now read in evidence may be received in evidence and marked Defendants' Exhibit 7.

Mr. ROBERTSON: Exception.

Mr. McCLANAHAN: We offer in evidence letter dated December 16th, 1897, addressed to Dear Ruby, signed J. Alfred Magoon

145 and Dorothea Lamb and identified by the witness as being one of the letters referred to in Plaintiff's Exhibit "K."

Mr. ROBERTSON: I object to the letter being received in evidence on the ground that it is irrelevant and immaterial and having no bearing whatever upon any issue in this case, hearsay inasmuch as the Plaintiff here is no party to it. It is not a letter to him or by him. And thirdly on the ground it is not proper cross examination.

Objection overruled.

The COURT: Letter referred to may be received in evidence and marked Defendants' Exhibit "8."

(Defendants' Exhibit "8" read in evidence.)

Mr. McCLANAHAN: Can you identify this as copies of letters stated to have been inclosed in that letter to Ruby Dexter?

A. Did you ask me if this was enclosed too?

Q. If you can identify that as the copy of the letter to Cowert and Kirkpatrick which is stated to have been enclosed in a letter which I have just read, to Mr. Dexter?

A. What was the date of that letter?

Q. December 16th.

A. Yes, sir, I can.

Mr. McCLANAHAN: We offer in evidence letter dated December 16th, addressed to—both of them addressed to Messrs.—one addressed to Messrs. Cowert & Kirkpatrick, Hagey Institute, Auckland, New Zealand, and the other to T. I. Cowert and J. H. Kirkpatrick, Hagey Institute, Auckland, New Zealand, signed by J. Alfred Magoon and

Dorothea Lamb; the former one and the latter one by J. Alfred Magoon—no, I guess I am mistaken,—one is signed by him.

Mr. ROBERTSON: I object to the admission of these letters offered in evidence on the ground that they are irrelevant and im-
146 material and having no bearing upon any issue in this case, and hearsay so far as this plaintiff is concerned and not proper cross examination.

The COURT: These are the enclosures alluded to in the letter last read.

Mr. MCCLANAHAN: They are.

Objection overruled. Exception.

The COURT: The letters identified may be received together and read in evidence and marked Defendants' Exhibit "9."

(Defendants' Exhibit 9 read in evidence.)

Mr. MCCLANAHAN: I offer in evidence copy of letter dated October 21st—I will ask the witness is that one of the letters referred to in Plaintiff's Exhibit "K" as a letter sent—written to Dexter?

The COURT: By Mr. Magoon?

Mr. MCCLANAHAN: It does not say that. "The letters written to Dexter were calculated to do us great harm." Is that a copy of one of those letters?

The COURT: What is the date of that Exhibit "K" Mr. McClanahan?

Mr. MCCLANAHAN: October 30th.

A. Yes, sir.

Mr. MCCLANAHAN: It is. I offer in evidence copy of letter dated October 21st, 1897, addressed to Ruby Dexter signed J. Alfred Magoon and identified by witness as being one of the letters referred to in Plaintiff's Exhibit "K."

Mr. ROBERTSON: We object to the letter being received in evidence as being irrelevant and immaterial and having no bearing upon any issue in this case, hearsay as far as this plaintiff is concerned
147 and not proper cross examination.

Objection overruled. Exception.

The COURT: It may be received and read in evidence and marked Defendants' Exhibit "10."

(Defendants' Exhibit "10" read in evidence.)

Mr. MCCLANAHAN:

Q. Is this one of the letters referred to in Plaintiff's Exhibit "K" as having been sent to Dexter?

A. Yes, that is one.

Mr. MCCLANAHAN: I offer in evidence copy of letter dated October 21, 1897, addressed to Mr. Ruby A. Dexter and signed J. Alfred Magoon and Dorothea Lamb and identified by the witness as being a letter referred to written to Dexter in Plaintiff's Exhibit "K."

The COURT: It may be received and read in evidence and marked Defendants' Exhibit "11."

Mr. ROBERTSON: I object to this being received in evidence.

The COURT: The order is set aside until the objection is heard.

Mr. ROBERTSON: It is irrelevant and immaterial and it doesn't relate to any issue in this case. It is hearsay as far as this Plaintiff is concerned and not proper cross examination.

Objection overruled. Exception.

The COURT: It may be received and read in evidence and marked Defendants' Exhibit "11."

(Defendants' Exhibit "11" read in evidence.)

Mr. MCCLANAHAN:

Q. Referring to Plaintiff's Exhibit "L" being the letter addressed to Judge Magoon, signed T. E. Cowert, I read as follows:
148 "We sold one half interest in Tasmania—this letter is dated October 1st. "We sold one half interest in Tasmania last week for 8000 sheep and 5000 Pounds. The parties could not—500 Pounds. The parties could not raise 500 Pounds after agreeing to and paid 250, I took half, less 250 Pounds. The sheep and lease of land, 24,000 acres, was valued at 2000 Pounds. We hope to sell the sheep in a short time." I will ask you if that is the only notice you ever had of this and all the notice you ever had of this sheep transaction with Mr. Harrison prior to the service on you of the New Zealand suit.

A. That was the only notice, Mr. McClanahan, and I have not any connection in my mind between those sheep and Mr. Harrison. I didn't know that referred to Mr. Harrison. When I got the summons I didn't understand that that referred to those sheep.

Q. You had no notice that that transaction was the transaction with Mr. Harrison?

A. No, I had not any idea it was at all.

Q. Did you have any knowledge or notice that Mr. Harrison was your partner?

A. No, I had not any at all.

Q. Did you have any notice or knowledge that you were obligated as a copartner to a guarantee amounting to 10,000 dollars in case of a dissatisfaction with Mr. Harrison with the Hagey Gold Cure business in Tasmania?

A. I know nothing whatever about it.

Redirect examination of Mrs. DOROTHEA EMERSON.

149 Mr. ROBERTSON:

Q. Who did you think this sheep transaction was entered into with?

Mr. MCCLANAHAN: I object to what she thought. Objection sustained. Exception.

Mr. MCCLANAHAN:

Q. Did you take any steps to ascertain who the sheep transaction was with?

Objected to as immaterial. Objection overruled. Exception.

(Last question read.)

A. The only steps we took was what you heard in Mr. Magoon's letter to Mr. Kirkpatrick and he tried to repudiate everything that he had done as soon as we had any suspicions aroused.

Q. Which letter is that, one of these letters that has been read?

A. Why yes, letters that we wrote to Ruby Dexter and letters that we wrote to Kirkpatrick and Cowert as soon as we had those suspicions that all was not right, we immediately did everything we could to repudiate their actions.

Q. None of those letters referred to the Tasmanian agreement or the sheep transaction did they?

A. They may not say exactly the sheep transaction, but anything that was questioned we wished to have repudiated.

Q. Well at no time did you or Mr. Magoon ever raise any question as to the sheep transaction did you?

Mr. McClanahan: I object to that as improper redirect examination.

(Last question read.)

Objection overruled. Exception.

150 A. It seems to me that certainly in one of those letters that something was said about their not having any right to sell the sheep.

Mr. Robertson:

Q. Not that I know of.

A. In Mr. Magoon's letter, I think Exhibit 7.

Q. I will ask you if this is the letter that you refer to, dated December 16th, addressed Dear Ruby, where it says: "They have sold territory as I understand and taken in payment sheep and lambs which they had no right to do"?

A. Yes, that is what I refer to.

Q. That is in defendants' Exhibit 8. And any other time prior to the beginning of this suit did you or Mr. Magoon raise any question as to that sheep transaction?

Objected to as improper direct examination. Objection overruled. Exception.

A. Why I know in a general way that as soon as our suspicions were aroused, as soon as we thought that Mr. Kirkpatrick and Cowert weren't honest men we immediately tried to get ourselves free from them. We did everything in our power to stop our power of attorney and put ourselves right, we did not want to be bound by anything wrong they had done.

Q. By taking all the steps in your power you refer to this correspondence which has been put in evidence here, do——

A. To that and to the instructions to Ruby Dexter to have our power of attorney cancelled.

Q. As contained in these letters that have been read?

A. Yes.

Q. Did you, or Mr. Magoon in your presence, speak to Col. Moore

when he arrived here in regard to this correspondence that
151 you had been having with Dexter and Cowert and Kirkpatrick?

Objected to as improper re-direct examination. Objection overruled. Exception.

A. I don't remember Col. Moore was there in the office for sometime and there were several of us present. I don't remember just what was said. We didn't altogether believe what Col. Moore stated there. It was subsequent facts that made us think that he and Mr. Ables were in the right and Cowert and Kirkpatrick were in the wrong. We were unwilling to believe this against Cowert and Kirkpatrick, we still thought they were honest men as long as we could.

Recross-examination of Mrs. DOROTHEA EMERSON.

Mr. MCCLANAHAN:

Q. Mrs. Emerson you say that these letters were the steps taken by you in the sheep matter; don't you take another step in connection with Mr. Magoon to send some one down there?

Objected to as irrelevant and immaterial and not proper re-cross examination. Objection overruled. Exception.

Q. A man named Good?
A. What do you say?
Q. Did you not send some one down there or make arrangements to send some one down there to represent you, to cancel and straighten out matters, a man named Good?

152 Objected to as irrelevant and immaterial and hearsay. Objection overruled. Exception.

Mr. MCCLANAHAN:

Q. Do you know anything about that matter?
A. I don't remember it.

Direct examination of L. C. ABLES, Recalled for Plaintiff.

Mr. ROBERTSON:

Q. Mr. Ables, state whether or not you have made up the statement in regard to the item of territory referred to in the trial balance of October 31st?
A. I have.
Q. Have you it there?
A. I have.
Q. Just state what represents the item that make up the total item found in the trial balance?
A. It does.

Mr. MCCLANAHAN: I object to it as incompetent, irrelevant and immaterial unless it can be shown that the notice of it was brought home to the defendants, Magoon, McStocker and Emerson.

Mr. ROBERTSON: The trial balances were sent to Mr. McStocker. Objection overruled. Exception.

The COURT: It may be received and read in evidence and marked Plaintiff's Exhibit "N."

(Plaintiff's Exhibit "N" read in evidence.)

Q. Smith, Garlick & Pollock, 4500 Pounds. Was that also on account of the New South Wales, that last item?

153 A. Yes it says so there.

Q. You didn't put it down——

Mr. ROBERTSON: I ask leave of the Court to question this witness further as to the date of Col. Moore's departure from Auckland, for Honolulu. I understood him yesterday to say that it was in October. I find in looking over Mr. Ables' testimony on the last trial that he testified different and I would like to have an opportunity of his correcting his testimony on that point.

The COURT: I think that permission should be accorded.

Mr. ROBERTSON:

Q. Mr. Ables, I will call your attention to this question and answer in the transcript of testimony at the last trial relating to Col. Moore: "Q. Have you refreshed your memory by referring to the book as to the date of Moore's departure for Honolulu? A. As near as I can arrive at it it was the 6th of December. There is money charged to him on that date and he left about that time. The ticket was not paid for until after."

A. I can show why there might be a little difference in that time by that book.

Q. Which book?

A. By the book there. It was impossible for me to tell by memory and I referred to the book when Mr. Moore got the money. He got some money at one time and I find another time there on this trial I find the money was actually charged to Mr. Cowert and Kirkpatrick on the 1st of October, paid to him, and I can show it to you Mr. Robertson, and I might have thought that he travelled on that money that was charged to him at the time instead of this money. I knew that he could not go without money. That is the way I got it. I did not pretend to remember those things. I

154 find upon looking over this that the money was charged.

Q. To Cowert and Kirkpatrick?

A. To Cowert and Kirkpatrick but paid to Col. Moore.

Q. What date?

A. That would be October 2nd.

Q. Well, in your judgment, the best of your recollection, now upon what date or about what date would Col. Moore leave Auckland for Honolulu, about the 2nd of October or 6th of December?

A. About the 2nd. About the 2nd, that is the time he got the money from Mr.——

Q. What I want to arrive at is which date is correct, the 2nd of October or 6th of December, the date of his leaving Auckland. That is the same book that you referred to at the time of your testimony at the last trial Mr. Ables, was it not?

A. Yes, sir, it is the only book that I have had Mr. Robertson. Col. Moore got some money on the 6th and I accounted for that date probably that way. He got this month on October 2nd, it was not charged to him, Cowert and Kirkpatrick had money due them and they owed Col. Moore, and they instructed me to give Col. Moore the money and charge it to their account, which I did.

Q. Didn't you pay Col. Moore money in December?

A. Yes, sir I paid him some money in December, but I see it was a small quantity.

Q. Well, then he must have been there must he not in December?

A. I paid him, yes, he must have been there. That was only 6 Pounds I find on that date.

Q. I will read this evidence of yours on the trial again: "Q. Have you refreshed your memory by referring to the book as to the date of Moore's departure for Honolulu? A. As near as I can arrive
155 at it, it was the 6th of December. There is money charged to him on that date and he left about that time."

A. Well there is money charged on that date but there was not so much charged as there was at this other time, 500.

Q. Does the fact that there is an entry there, money paid to him, refresh your memory now, to the effect that he didn't leave until the 6th of December?

A. He must have returned by that time, have got back by December. It is October, I am quite confident that he came away after he was paid that 100 Pounds, 50 charged to Mr. Cowert and 50 to Mr. Kirkpatrick.

Q. And you think that he returned in December?

A. I can't account for that 6 Pounds in any other way, it was paid to him and charged to this account.

Q. Did you account for it in your evidence on the last trial?

Mr. McCLANAHAN: I object to that as an effort to impeach the witness.

Objection sustained. Exception.

Mr. ROBERTSON: With consent of counsel for defendants I would like to read in evidence the testimony of E. I. Spalding as given on the previous trial of this case.

Mr. McCLANAHAN: We will admit the value of 2000 Pounds Sterling to be what Mr. Spalding testified it to be.

Mr. ROBERTSON: I propose to read to the Jury if the Court please the deposition of Alfred Adward Gilmore and will read Mr. Spalding's testimony first.

(Evidence of E. I. Spalding commencing on page 37 of the testimony of the second trial of the case of Harrison *vs.* Magoon and others, September 1901 read in evidence)

156 Mr. McCLANAHAN: We object to the reading of this deposition of Mr. Gilmore's on ground it is not a deposition taken in the case at bar. It is being read here against defendants who were not in the suit at the time the deposition was taken. We made the objection because we were sued jointly as partners.

The COURT: Objection overruled.

The deposition may be read.

Mr. McCLANAHAN: Exception.

(Deposition of Alfred Edward Gilmore read in evidence)

In answer to question 32 being read Mr. McClanahan made the following motion:

Mr. McCLANAHAN: I ask that his suspicions be stricken out, the whole answer.

The COURT: That portion of the answer may be stricken out, his suspicions. "I do not know" may remain in.

On the answer to question 34 being read Mr. McClanahan made the following motion:

Mr. McCLANAHAN: I ask that that be stricken out, because it is based on the answer which has been stricken out.

The COURT: It may be stricken out.

Mr. ROBERTSON: Exception.

"Q. 35. Did you mention the matter to Harrison?

A. Yes, sir."

Mr. McCLANAHAN: I object to that and ask that it be stricken out.

The COURT: It is so ordered.

Mr. ROBERTSON: Exception.

Mr. ROBERTSON: "Q. 36. If so whom?

A. On several occasions."

157 Mr. McCLANAHAN: Object to that and ask that it be stricken out.

The COURT: Motion granted.

Mr. ROBERTSON: Exception.

Mr. McCLANAHAN: I object to question No. 44 as immaterial and ask that the answer be stricken out.

Objection overruled. Exception.

Mr. McClanahan objects to question No. 49 as calling for hearsay evidence.

Objection overruled. Exception.

Mr. McClanahan objects to question 52 as being immaterial.

Objection sustained. Exception.

Mr. McClanahan objects to question 53 as immaterial.

Objection sustained. Exception.

Mr. McClanahan objects to question 54 as being immaterial and being based on the last question disallowed.

Objection sustained. Exception.

Mr. McClanahan objects to question 56 calling for the conclusion of the witness.

Objection sustained. Exception.

Mr. McClanahan objects to question 57 as immaterial and calling for the conclusion of the witness.

Objection sustained. Exception.

Mr. McClanahan objects to question 58 being based on the question which has ruled out.

Objection sustained. Exception.

Mr. McClanahan objects to question 59 as immaterial.

158 Objection sustained. Exception.

(Here the Court after the usual admonition to the Jury adjourned until tomorrow morning at 9 o'clock.)

159 In the Circuit Court of the First Circuit, Territory if Hawaii.

T. M. HARRISON
vs.
J. A. MAGOON ET AL.

NOVEMBER 2, 1903.

Direct examination of T. M. HARRISON, sworn.

Mr. ROBERTSON:

Q. What is your name?
A. Thomas Milner Harrison.
Q. You are plaintiff in this case?
A. I am.
Q. State whether or not you are acquainted with T. E. Cowert and J. K. Kirkpatrick and L. C. Ables?
A. Yes, sir, I know them.
Q. Where did you become acquainted with them?
A. In Auckland, New Zealand.
Q. When?
A. About in July or August, 1897, I think about that time.
Q. Did you enter into any transaction with them?
A. Yes, I entered into the contract under which I am suing.
Q. I show you Exhibit "C" and ask you if that is the contract you refer to?
A. Yes that is it.
Q. Is this your signature T. M. Harrison?
A. Yes.
Q. Whereabouts was this contract prepared?
A. In Auckland.
Q. Whereabouts in Auckland?
A. Well it was prepared at the Hagey Institute chiefly and
160 it was signed there and drafted there. It was typewritten at my office.
Q. You have heard Mr. Ables' Testimony that when this contract was signed the words in paragraph 4, which are underlined here, the words "if at or before" were not in the agreement. What have you to say to that?
A. They were in it. We discussed the matter over and they were put in.
Q. Has any change whatever been made in this agreement since it was signed?
A. None whatever.
Q. With reference to this transcation, had any other drafts of agreements been prepared prior to the one we have just referred to?
A. Yes, sir, there were two others.
Q. Do you remember the date that the first draft bore?
A. I think it is the 16th September.
Q. I will ask you—I show you this document and ask you if this is it?

A. Yes, that is it.

Q. I notice interlined between the typewritten lines of this contract certain words in lead pencil. I will ask you whether those words in lead pencil were there at the time the agreement was signed?

A. They were put in since.

Q. What was the occasion of putting them in.

A. Well when we were preparing the new draft, making the draft for the later agreement they were put in as the change desired.

Q. In other words, a guide to the typewriter?

A. Yes, sir.

Mr. ROBERTSON: I offer this in evidence if the Court please.

Mr. MCCLANAHAN: No objection.

The COURT: It may be received in evidence and marked Plaintiff's Exhibit "O."

(Plaintiff's Exhibit "O" read in evidence.)

161 Mr. ROBERTSON:

Q. How did it come about Mr. Harrison that changes were agreed upon to be made in this first draft of the agreement?

A. Well some things were unsatisfactory and we thought we could put in more satisactory shape and they were simply changes agreed upon to be made, and besides that I had not seen the documents by which the Hagey Company—under which I was contracting, had been formed, either the powers of attorney and their partnership articles at the time that that first draft was made, and when I afterwards saw them I wanted some changes made.

Q. Do you remember the date of the second draft of the agreement?

A. I think September 20th or 21st.

Q. I show you this document and ask you if this is that second draft?

A. Yes, sir, that is it.

Mr. ROBERTSON: I offer it in evidence if the Court please.

The COURT: It may be received in evidence and marked Plaintiff's Exhibit "P."

(Plaintiff's Exhibit "P" read in evidence.)

Q. There are certain words written in here in lead pencil, state whether or not they were in at the time the agreement was signed?

A. No, they were not in at the time the agreement was signed. They were made at the time we were considering the new draft or either of them, I forget which.

Q. What was the consideration for this transaction that you and Gilmore had with the Hagey Company?

A. I had an interest in the lease of a sheep run with six thousand old sheep—six or seven odd, sheep and it was agreed that Mr. Ables would take them in lieu of 2,000 Pounds and that I should
162 be given a 2000 Pounds interest in Tasmania.

Mr. MCCLANAHAN: If the Court please I ask that what Mr. Ables agreed, be stricken out.

A. I said it was agreed between me and the Hagey Company.

Mr. ROBERTSON:

Q. Do you know why the transfer of the sheep was made to Ables personally?

A. The explanation that Cowert and Kirkpatrick gave we was that Ables wanted to get out of the Company and that he was willing to take this in part payment of his interest in the Company that is, for the purpose of buying him out, and that consequently it was to be transferred to him and I was to get an interest in Tasmania in lieu of the proportion of Mr. Ables' interest that I bought out.

Mr. MCCLANAHAN: I ask that the answer of the witness be strickenout as hearsay so far as the Company was concerned, what Cowert and Kirkpatrick told him that Ables——

A. I afterwards asked Mr. Ables if it were true and he said he would rather ranch than stay with the Hagey business.

Mr. MCCLANAHAN: I object to the witness breaking in in that way while there is a motion before the Court.

The COURT: The motion is granted as to what communications were had as to the effect of this transfer, to this witness by Cowert and Kirkpatrick, the reason for it as stated to the witness.

Mr. ROBERTSON:

Q. State whether or not the transfer of your sheep and sheep run to Ables was in writing?

A. Yes.

Q. I will ask you if this is the instrument of transfer?

A. Yes, sir, that is it.

Mr. ROBERTSON: I offer this in evidence if the Court please.

163 The COURT: It may be received in evidence and marked Plaintiff's Exhibit "Q."

(Plaintiff's Exhibit "Q" read in evidence.

Mr. ROBERTSON:

Q. State whether or not when the third draft of the agreement with the Hagey Company was made, that is, the contract upon which this suit was brought, any further consideration was added as a consideration for your interest in the Tasmania partnership?

A. Yes, it was arranged that Robaison would release all claim he had against the 500 odd sheep that I had assigned to Ables and I held in possession.

Q. Was that put in writing?

A. Yes.

Q. I will ask you if this is the writing?

A. Yes, that is it.

Mr. ROBERTSON: I offer this in evidence if the Court please.

Mr. MCCLANAHAN: Of course I suppose counsel is going to show ratification on the part of defendants in regard to these matters. I object to it unless there is a ratification shown.

Mr. ROBERTSON: We all know that is a part of our case; if we do not do it the defendants get the benefit of it.

The COURT: Upon the offer of counsel the objection is overruled. It may be received and read in evidence and marked Plaintiff's Exhibit "R."

Plaintiff's Exhibit "R" read in evidence.

Mr. ROBERTSON:

Q. After signing this agreement with the Hagey Company,
164 what did you do pursuant to it?

A. I made arrangements to go and start the business in Tasmania. They said the medicines were not quite ready when the boat was to sail for Sidney on the 4th of October, there was another steamer sailing in four or five days, and they told me if I would go over to Sidney by the first boat, the one on the 4th of October they would send me the medicines and also the instructions for carrying on the business, on the boat coming four or five days afterwards, and that would be the 8th or 9th of October, or sometime, then, I forget the exact date, and I accordingly went on the boat on the 4th of October, or I sailed about two o'clock in the morning of the 5th and waited in Sidney until I received a letter from Mr. Ables dated, I think it is the 12th October, and also the medicines and instructions for carrying on the business in Tasmania.

Q. When you refer to that letter of Mr. Ables you mean the one that was filed in evidence?

A. Yes, sir.

Q. Addresed to you at Sidney?

A. Yes, sir I did not receive the instructions for a day or two after I had received the letter, they were delayed in the post office some way but I got them ultimately; then I was very much dissatisfied with the instructions, they were different from what they had represented to me and I desired to go back and try to get out of the contract on account of the business being of a different nature from what the Hagey people represented it.

Q. I will ask you whether or not those instructions were in writing?

A. They were in typewriting as I remember it corrected in Mr. Cowert's handwriting.

Q. I will ask you whether these are the instructions that accompanied the medecine sent to you at Sidney by the Hagey Company?

165 A. Yes, sir.

Mr. ROBERTSON: I offer this in evidence if the Court please.

Mr. MCCLANAHAN: No objection.

The COURT: They may be received in evidence and marked Plaintiff's Exhibit "S."

(Plaintiff's Exhibit "S" read in evidence.

Mr. ROBERTSON:

Q. I understood you to say that these written instructions didn't coincide with representations that had been made to you with refer-

ence to what the treatment consisted of; in what respect do they differ?

Q. It has been represented to me that the drugs they used would not make a man sick unless he took narcotics for which he was being cured, that they didn't give drugs that would make anybody sick, just because a man used whiskey or opium, or whatever it was they were using why they represented that they didn't use narcotics, and represented people who didn't use narcotics for which patients were being cured caused the narcotics to be distasteful, which a person had been in the habit of using, distasteful to him, so that it would make him sick, and that the preparation used was a secret only known to the medical profession. And they denied the fact that they used aqua morphia or any drug that would make a man sick when any of their patients disobeyed them or used a narcotic for which he was being cured, and said that any person that said that, slandered them or didn't know what he was talking about, that they were in the habit of using such a thing, that it was not so, and

166 they referred to their position in the church, and Dr. Wolvington's position as a preacher and stated that as Christians and gentlemen it was not so,—that was part of the representation getting me to put money into the thing. When I found out that what they had affirmed and denied—what they had affirmed was exactly the reverse of the nature of the business I came to the conclusion that the preparation was not a secret from the medical profession, from things I had been told by doctors it could not be made a permanent success, that it was merely tricking a man into believing that whiskey or whatever he was being cured of made him sick when nothing of the kind occurred, and that he would soon discover the trick played on him and be in a worse position after it than he had been before in many cases, and as a result it was a humbug business and could not be made a permanent success of and I wished to be let out of my bargain.

Q. Well before leaving, starting for Tasmania, were any representations made to you by the Company with reference to the treatment deceiving the patient?

A. They said they didn't deceive the patients at all, that they never gave him anything that would make a sound man—that they could give the same thing that made him sick to any other person that was not taking a narcotic and it would not make that person sick, and they said they had to be constantly doing that for patients to take the same thing or formula, the same thing that they were giving the patient would get sick and they themselves would not.

Q. State whether or not you became dissatisfied with the business by reason of these written instructions?

A. I never thought I could make the business satisfactory after I read those instructions.

Mr. McClanahan: I ask that the answer be stricken out

167 as irresponsive to the question.

(Last question read.)

The Court: The question is susceptible of chronological answer it seems to me.

The motion is granted. Let the answer be stricken out.

(Last question read.)

A. Well I can only say that I thought I could not make the business satisfactory when I read the instructions.

Mr. McClanahan: I make the same motion.

A. Whether that amounts to dissatisfaction.

The Court: Let the motion be granted.
The answer may be stricken out.

Mr. Robertson:

Q. I will ask you if you can make any more definite answer to that question Mr. Harrison?

A. I was dissatisfied.

Mr. McClanahan: I object. An answer has not been made to the question.

The Court: The motion has been granted to strike it out.
Objection sustained. Exception.

A. As far as the business had gone I was dissatisfied with it.

Mr. Robertson:

Q. When?

A. When I received the instructions as far as the business had gone and as far as the instructions were considered they were insatisfactory.

Q. Then what did you do?

A. I wanted to see some people in Melbourne, and also thought I could get a steamer from Melbourne at an earlier date,
168 steamer for New Zealand from Melbourne at an earlier date than I could from Sidney, so I went down to Melbourne, and found I could not get a steamer as I had expected, I remained a day or two in Melbourne, came back and got a steamer from Sidney to Wellington, one not sailing for Auckland for sometime, and proceeded to Wellington, and that from Melbourne I telegraphed to all the people I knew of that ever seen those sheep, except Robaison, that I claimed the sheep, not to buy them, something to that effect, I think it was "Don't buy sheep, returning." So I expected that these people would sell the sheep as soon as possible and try and hinder me and I could not get out of the contract and they would try to realize anything they could out of them, no matter what it was, consequently I cabled to four or five people that I thought knew most about the sheep not to buy, I think it was, not to buy sheep, returning. I did not cable to Robaison because I knew he would get the sheep if he could and cabling him would only put him on his guard. I took the steamer from Sidney as soon as I could for Wellington, and met Robaison who told me that he had the only thing that was worth anything, and that was the sheep, and advised me that I had been taken in, I think he invited me to take a journey, which I did not accept, and then I went straight north to Auckland and as soon as I could I tried to get out of the bargain. Messrs. Cowert

and Kirkpatrick and the Hagey people said they had not got the stock of the market value of 2000 Pounds but that would get me the sheep back, although they had sold them, that they thought they could cancel their contract for the sale of the sheep and get the sheep back. I said that would be satisfactory. I waited at Auckland for a time to get the sheep back and I even went out to the run
169 to look at the sheep in the meantime, and they utterly failed to get the sheep back and said Robaison would not sell them the sheep for anything less than it cost them to buy me out, 2,000 Pounds.

Mr. McCLANAHAN: I object to anything that Robaison said.

A. That is the reason that they gave me for not being able to get the sheep back.

Q. Are they statements of Robaison?

A. No, they are statements of Cowert and Kirkpatrick, the reason why they didn't get the sheep back.

Q. That they gave you?

A. Yes, sir, that they gave to me, that they could not get them back from Robaison, any cheaper than it would cost to give me 2000 dollars back.

Q. That was the response to you?

A. That was the ultimate response, and I waited for several weeks, in the course of 8 or 10 weeks they kept me waiting to get the sheep back and ultimately that is what they told me, that they could not get the sheep back any cheaper than it would take to buy me out for 2000 Pounds and said that I had better go on with the contract.

Mr. ROBERTSON:

Q. Then what did you do?

A. So I concluded that I would go to Tasmania and give the thing a trial and see if I could make it worth the money I paid for it. I didn't think I could but I would rather have done that than have been obliged to try and collect and go for these people as I have been obliged to do. And I went there for a month and became quite convinced that my only recourse for my getting the money back that I put into the thing was to acquaint them with my dissatis-
170 faction and secure stock of the market value of 2000 Pounds

Q. Had any one preceeded you to Tasmania under the terms of this contract with the Hagey Company?

A. Yes, sir, Gilmore went some time in November. I urged him to go and promised him a month's salary, promised him the payment of his salary if he would go and work up the business so that when I or anybody else followed he would have made some preparation for starting an institute.

Q. Did anybody else go there besides Mr. Gilmore?

A. O'Brien went with me on the 17th of January.

Q. Who was O'Brien?

A. He was a man sent by the Hagey people under the clause in the agreement under which they had a right to send one of themselves or some competent person to assist us.

Q. Did you and O'Brien go together?

A. We started together, he arrived about three days before I did. I went overland from Sidney and he went direct by steamer. It took him only three days. I had some people to see in Melbourne, I was about three days later in arriving than he was.

Q. What part of Tasmania did you go to?

A. We went to Hobart the capital.

Q. The capital of the Colony?

A. Yes, sir.

Q. How large a city is that?

A. I think a city of about 30,000 people.

Q. In arriving at Hobart what did you do first to start the business?

A. We advertised it and distributed circulars and went around and interviewed the leading people in the town to get their assistance and announce the nature of our business, to get information as to prospective patients, all the information we could, rented premises
171 and prepared to do business.

Q. Well do you know whether or not that was the usual method?

A. That was the method.

Q. Of starting this or the business of the Hagey Institute?

A. That was the method, what we had been told, and that it was, that was the only method I had ever seen, the method told me by Cowert and Kirkpatrick and the other Hagey partners.

Q. Tell us in further detail if you can what you did with reference to the business in Hobart?

A. We didn't succeed in getting any patients and there was some trouble arouse between Gilmore and I and O'Brien, we believed that he was holding patients back from certain things he said.

Mr. McClanahan: I ask that that be stricken out, the conclusions and reasons.

The Court: The motion is granted. Let the words following "we believe-" be stricken out.

Mr. Robertson: Exception.

Q. I will ask you again what did O'Brien say to you in regard to the matter?

Objected to.

Objection overruled. Exception.

Mr. Robertson:

Q. What statements of O'Brien do you refer to?

A. Well, he said when Kirkpatrick arrived there, they would be better people to treat patients, that Gilmore and I had not enough experience he thought to treat patients and they would be better people to handle patients after Kirkpatrick arrived. The funds run out and on the morning of the 1st of March, I think it was, and it was raining, if I am——

172 Q. Wait a minute. What kind of premises did you secure for your institute?

A. We secured premises on one of the principal streets, I think it

was near the post office, a two story house, and as good as we could get for the money we had to spend.

Q. How many rooms to it?

A. There were three or four bedrooms upstairs and there was a room we intended to make into a billiard room and a sitting room and office, a sort of office, secretary's office, a sitting room down below, and then we had a place at the back where we kept liquors and medicines for treatment.

Q. Were the premises large enough for a Hagey Institute?

A. Yes, sir, as large as the money we had warranted and large enought to treat patients in.

Q. Can you give us any further details, any action as to matters connected with the business in Tasmania or your methods and advertisements to get patients?

A. Well I interviewed the relatives of some of the prospective patients and they seemed disposed to send patients, but they finally said O'Brien had told them——

Mr. McCLANAHAN: I object to what O'Brien said.

A. If I cannot testify to what they said then——

Mr. McCLANAHAN: You are a lawyer Mr. Harrison.

A. I think it is part of the *res gestæ* of the reason they gave for not sending the patients.

Mr. McCLANAHAN: I object to what the relations of prospective patients said.

Mr. ROBERTSON:

Q. Did you leave anything undone that you might have done to make the Institute a success?

A. No, I was very anxious——

173 Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception.

Mr. ROBERTSON:

Q. Did you fail to do anything that was usually done in connection with starting a Hagey Institute.

Mr. McCLANAHAN: Same objection. Calling for the opinion of the witness.

Objection sustained. Exception.

Mr. ROBERTSON:

Q. As a matter of fact did you succeed in getting any patients in your institute at Hobart?

A. No, we did everything we could think of to obtain them, Gilmore and I, myself particularly and Gilmore also and what I asked him to do in the matter and we could no- succeed in getting anything. We followed out all the instructions and advice as closely as we could that had been given to us and many other things *and many other things* we had gained, from the partnership and we followed out any advice of our own that we could think of.

Q. How long did you keep your institute open?

A. About a month.
Q. From when to when?
A. From the 1st of February to *to* 1st of March. I was very much afraid of being accused of bad faith and I did my utmost to get the institute started.

Mr. McCLANAHAN: We ask that it be stricken out as irresponsive.
The COURT: It may be stricken out from the words "I was very much afraid."
Mr. ROBERTSON: Exception.

174 Q. I will ask you whether or not a fund for the starting of the Tasmanian business was put up under the terms of your contract with the Hagey Company?
A. I put up my share and the rest of the Company put up their share, Gilmore, we deducted 10 Pence from one month of his salary as his share, he never put up any cash, it was deducted from his salary.
Q. Can you state how much was put up in cash?
A. I put up 80 Pounds and the people, the Auckland people whom I contracted with at Auckland, put up 110 Pounds.
Q. Pounds Sterling?
A. Sterling, yes.
Q. I will ask you whether the statements of your receipts and disbursements attached to Mr. Gilmore's disposition whether it is correct?
A. Yes, that is correct at the time I handed the balance over to Mr. Gilmore.
Q. And that balance was how much?
A. 34 Pounds 16 Shillings on the 11th February.
Q. Can you state whether or not there are any debts of obligations owing to the Institute at that time?
A. When we went away at the end of the month the balance that we left in the Bank was some 18 or 19 Pounds as I remember it, was barely sufficient to pay the outstanding obligations without paying a claim that Gilmore had of 30 Pounds salary which I said he was not entitled to.
Q. Was it possible to continue the Institute any longer?
A. Not without——

Mr. McCLANAHAN: I object to that as calling for the opinion of the witness.
Objection sustained. Exception.

175 Mr. ROBERTSON:

Q. Could you carry on the business any longer?

Objected to on the same ground.
Objection sustained. Exception.

Mr. ROBERTSON:

Q. Could the business have been maintained any longer?

Objected to on the same ground.
Objection sustained. Exception.

Mr. ROBERTSON:

Q. Were either you or Gilmore or the Hagey Company willing to put up any further funds for the continuance of the business?

Objected to as immaterial.
Objection overruled. Exception.

A. Mr. Cowert and Mr. Kirkpatrick and the other members of the Hagey Company, O'Brien he had a thought they would not put up any more money than the 200 Pounds, and Gilmore said they would not give the same, and when we consulted about the matter we decided it was hopeless to try and go on because they had shown us that that was all the money they were going to put up.

Q. State whether or not you became dissatisfied with the condition of the business in Tasmania?

A. Yes, I became very much dissatisfied with it.

Q. Why.

A. Because there was no prospect of making the value that I had put into it out of the business, I didn't see any possible chance of ever realizing anything out of it. We had failed to take in any money, there was no money in the treasury, and there was no immediate prospect of getting any money, and I had about 2000 Pounds, or sheep of the value of it and there was no prospect
176 of my getting it out of Tasmania that I could see, so I consequently was dissatisfied.

Q. Then what did you do?

A. I proceeded back, Gilmore left the day before I did and I handed the whole thing over to O'Brien who was the representative of the other parties to this other contract, and proceeded north to Sidney on my way to Auckland on the 9th of March, 9th or 10th of March. I was only—at the hotel where I was stopping at in the city was Wolvington and Kirkpatrick. They said they had heard I was dissatisfied with the agreement and wanted to know what was wrong and I told them my reason for dissatisfaction in much the same way as I have given evidence here, and said I demanded stock of the market value of 2000 Pounds. They said they didn't want me to—they wanted me to retain an interest in the Company as I knew too much about their method of treatment and if I got out of it altogether, to kindly send them a statement of the best terms of settlement I could make and write them a letter to that effect. So the following day I wrote them a letter, on the 11th of March.

Q. How did you make the demand for the 2000 Pounds worth of stock?

A. I demanded stock of the market value of 2000 Pounds and they asked me to put my demand in writing and also the best terms of settlement.

Q. You say you did put your demand in writing?

A. On the following day I wrote them what I would do in settlement.

Q. You say you did put your demand in writing?

A. Yes, sir. The copy of the letter was filed for the—writing to request their terms——

Objected to on the ground that the writing speaks for itself.

177 Mr. ROBERTSON:

Q. Under what provision in the contract, if any, did you make this demand on Cowert or Kirkpatrick?

A. Under clause 4.

Mr. MCCLANAHAN: I object. The contract speaks for itself.

Objection sustained. Exception.

Mr. ROBERTSON:

Q. State whether or not Kirkpatrick made any reply to your demand except a request for you to state the terms upon which you would settle?

A. That was about the only reply that I remember, to let him know the best terms on which we could settle, that he didn't want me to get out of the Hagey business altogether, on account of my knowing so much about it he wanted me to retain some interest, and let him have the best terms on which I could settle and kindly write them to him.

Q. Did you tell him on what terms you would settle?

A. I wrote to him the next day on the terms I would settle.

Q. Do you know where the letter is you wrote to him?

A. Well, I kept a copy of it, there was a copy in Court here at the last trial.

Q. Do you know where that letter is that you wrote to him?

A. I suppose he has it, I don't know.

Q. Have you got it?

A. I have not got it.

Q. Who was present when you made the demand on Kirkpatrick?

A. Wolvington and he and I.

Q. In what capacity did you make demand upon him?

Objected to as immaterial and calling for the conclusion of the witness.

178 Objection sustained. Exception.

Q. I will ask you whether or not this is a copy of the letter you wrote at that time?

A. Yes, sir.

Mr. ROBERTSON: I offer this in evidence and marked Plaintiff's Exhibit "T."

(Plaintiff's Exhibit "T" read in evidence.)

Q. Did you receive any reply to that letter?

A. None in writing.

Q. Did you receive any reply?

A. I think I saw Kirkpatrick and he acknowledged that he received the letter.

Q. Anything further?

A. No.

Q. Did the Hagey Company deliver you or any one on behalf of the Company deliver you 2000 Pounds worth of stock in any other field of the Company's operations?

A. No.

Q. Did any one of the parties of the first part, that is individually, that is the parties of the first part, under this contract upon which you are suing, deliver you any stock of the market value of 2000 Pounds in any other field of the Company's operations?

Objected to.

(Here the Court took a recess until this afternoon 1:30 P. M.)

179 Afternoon Session.

Direct examination of T. M. HARRISON, resumed.

(Last question read.)
Objection overruled.

A. No, nobody has ever offered me any stock of that market value.

Mr. ROBERTSON:

Q. Or the value of the stock?
A. No person has ever *ever* offered me stock of the market value or the value of the stock in settlement.
Q. On your return from Tasmania to Auckland did you see Mr. Ables?
A. I saw him after I arrived in Auckland.
Q. On your return from Tasmania?
A. Not from Tasmania, no, no, on my first return from Sidney I Did.
Q. Did you see Mr. Ables on -our return from Tasmania?
A. I did not.
Q. Did you know where he was?

Objected to as immaterial.
Objections sustained. Exception.

A. I had not been informed.

Mr. ROBERTSON:

Q. Was Mr. Ables in Auckland, on your return to Auckland from Tasmania?
A. I could not find him, I tried my best to find him and could not find him; I could not find any of the Hagey partners at all.
Q. And the two that you did find were where?
A. I saw Wolvington and Kirkpatrick at Sidney and I heard Cowert was in the Southern part of New Zealand. I never saw him after my return. The rest I could not locate.

180 Mr. MCCLANAHAN: I object to his statement of what he heard.
The COURT: That may be stricken out. "I Heard Cowert" etc.

Q. You didn't see Cowert as a matter of fact?
A. He was served with the writ under the New Zealand statute but I didn't see him at all.

Mr. ROBERTSON:

Q. On your return to Auckland from Tasmania did you endeavor to find other members of the Hagey Company than Wolvington and Kirkpatrick?

A. Yes, sir I endeavored to find——

Objected to as immaterial.

Objection overruled. Exception.

A. I endeavored to find them all, find their whereabouts.

Q. Could you find any others?

A. I could not find the whereabouts of—I could not find where any of them were except Cowert. I could not find any definite information but the ones who were resident at Honolulu, of course?

Q. State whether or not you entered suit in the New Zealand Court against the Hagey Company on this claim?

A. I did as soon—as soon as we found out we could not find where they were.

Q. What was the result of that suit?

A. I got judgment for the full amount of my claim.

Q. I will ask you whether or not this is a copy of the judgment you obtained in the New Zealand Court?

A. That is a certified copy, yes, sir.

Mr. ROBERTSON: I offer this in evidence if the Court please.

181 Mr. MCCLANAHAN: I object to it as incompetent, irrelevant and immaterial.

Objection overruled. Exception.

The COURT: It may be received and read in evidence and marked Plaintiff's Exhibit "U."

(Plaintiff's Exhibit "U" read in evidence.)

—. ——.

A. George Edward, Jr., this is another one of the same name as himself.

Mr. ROBERTSON:

Q. Did you ever receive or collect anything on the New Zealand judgment?

A. No.

Q. At any time after entering into the agreement upon which this suit is brought, did you receive any notice from any one of the members of the Hagey Company that they repudiated or disaffirmed in any way that agreement?

A. No.

Q. After your notification of dissatisfaction did any member of the Hagey Company offer to return to you any part or portion of the consideration which you had paid to the Company for entering into the agreement?

A. No, they did not.

Q. Did a man by the name of Ruby Dexter ever notify you on behalf of any members of the Hagey Company that they or either of

them affirmed or disaffirmed the agreement that had been made with you?

A. He did not.

Q. What was the value of the sheep run and sheep that you turned over to the Company as the consideration on your part of this agreement?

Mr. McCLANAHAN: I object to it on the ground he is not shown to be qualified to testify as to the value.

Objection sustained. Exception.

182 Cross-examination of T. M. HARRISON.

Mr. McCLANAHAN:

Q. How long have you been a lawyer Mr. Harrison?

A. Since November, '91.

Q. Were you doing business in 1897 in Auckland as attorney?

A. Yes, sir.

Q. You had an office there?

A. Yes, sir.

Q. How long had you practiced?

A. I went there in about December, '94 I think it was and was admitted a few months afterwards, had a practice from then until about——

Q. About three years?

A. Yes, sir.

Q. Had you a partner?

A. No, I was by myself.

Q. How did you happen to run against this Hagey business?

A. I met Cowert at the same boarding house I was stopping at.

Q. He was stopping at the same boarding house that you were, all through your negotiations?

A. Yes, sir.

Q. Up to the time you left there?

A. Yes, sir.

Q. Were you and he quite friendly?

A. Yes, sir.

Q. Had you known him—You said yes?

A. Yes we were quite friendly.

Q. Had you known him prior to meeting him in the Hagey business?

A. No, I had not known him prior to meeting him down there when we got into the business.

Q. And as a result of meeting him there did you go into the Hagey Institute in Auckland after meeting him?

A. Yes, sir, several times.

183 Q. And he showed you how it was done, the working of the institute?

A. Well he showed me some of it.

Q. Showed you enough to interest you in the business?

A. Yes, sir.

Q. Did you make any inquiries as to how the business was done?

A. Oh, some slight inquires. There was some things they didn't want to tell me, they said were secret. I didn't inquire very far into them but I made inquiries as far as they permitted me to do so.

Q. Had you ever been in business before your admission to the bar as attorney?

A. In business?

Q. In any kind of business?

A. I was in a bank once, in the banking business.

Q. Anything else?

A. That is all I think.

Q. And from the banking business you went into the profession of an attorney?

A. I went into the University after I had been in the bank for awhile there I studied law in the University.

Q. Well aside from secret, this about the treatment, did he answer all your inquiries in regard to the matter?

A. Yes, sir, he answered all except those which he said he wished to keep secret.

Q. What were the secret things?

A. Well he didn't want to tell me, give me the names and detail about the number—about all the patients they were treating, because he said that they didn't want—a great many didn't want to be known as patients.

Q. He didn't want you to know their names, of the persons?

A. No.

Q. That was all, was it not?

A. He didn't give the exact numbers. He gave me a state-
184 ment in round numbers?

Q. But he was anxious not to give you names because the patients themselves did not like to have it known they were taking the drunk cure?

A. Yes.

Q. What else was it he kept from you?

A. He didn't give me the information I sought. He failed to give me with regard to instructions for carrying on the business, nor did he let me know what kind of drugs he used.

Q. Be specific. What did he fail to give you, did you ask for anything that he failed to give you?

A. I asked if it were true that they used emetics only to make people sick and make people sick when they were using the narcotics that they were to be cured of, and he said it was not so.

Q. What else?

A. Well throughout the whole system of deceiving people as to what makes them sick, was absolutely not the case.

Q. Where had you heard that emetics were used in the treatment that made you ask if it were true that emetics were used?

A. Well I think he volunteered that information to commence with, and consequently I had him to reassure me on the point. He said people were accusing him of doing that.

Q. At any rate he satisfied you it was a good thing and you were willing to go into it?

A. It appeared so to me at the time.

Q. You gave up all your business to go into the drunk cure business?

A. Well for the time being.

Q. Who did the actual typewriting of these contracts?

A. I am not sure whether it was a clerk of mine or myself.

Q. Did you have a clerk?

A. I had a boy who did a good deal of my typewriting.

185 He was very expert at it. I used to do some myself.

Q. Didn't you do that yourself?

A. I can do typewriting.

Q. Didn't you do these typewritten contracts?

A. I typewrote some of them I know.

Q. Did you typewrite all the last one?

A. I think I did.

Q. The one sued on, and that was done in your office. Now when did you happen to meet Kirkpatrick?

A. Well I was introduced to him by Cowert.

Q. At the Institute?

A. Either there at the Institute or at the house, I forget which, though I think it was at the house. Kirkpatrick used to go to see him at the house. Sometimes I think he was at the house.

Q. He was a lawyer was he not?

A. They said they were both lawyers.

Q. *They said they were both lawyers.*

Q. What?

A. They said they were lawyers.

Q. Cowert and Kirkpatrick both lawyers?

A. Yes.

Q. What was it that made Cowert so anxious to show you round the place or did show you around the place?

A. He said they liked to have people come there to make it pleasant for the patients, also to have other people than patients in there so that the patient would not feel when they went in there they would be suspected as taking the cure. He would like other people than patients to be coming in and out of the place so that when patients went in there they would not be spotted as patients from the fact of their going into the house and also to make it pleasant and cheerful for them socially.

186 Q. He wanted you to patronize the institution and you went?

A. He said he would like to have me go there, that it did good in that way.

Q. Did you go in the day-time or in the evening?

A. Both, occasionally in the day but generally in the evening.

Q. How did it happen that he gave you the information that he did give you in regard to the institution, the number of patients and the work?

A. That was when we commenced to negotiate for the purchase of

territory in Tasmania, of course I made inquiries about how things were going.

Q. How long had you been going to the Institute when you began to negotiate for the purchase of your interest there?

A. Well I think I must first have gone to the place in July or August, and negotiations I don't think it lasted a month before the agreement was made.

Q. Who opened the negotiations?

A. Cowert.

Q. In what way?

A. He said he thought he had a purchaser for my sheep, if I would put the—what I got for the sheep into the Hagey business.

Q. How did he know that you had any sheep?

A. I had been talking to him about it.

Q. For what purpose?

A. Well I told him that they were a long distance off, four or five days' journey.

Q. What were a long distance off?

A. The sheep.

Q. Well what was your purpose in telling him about the sheep in the first place?

A. I don't know that I had any particular purpose except I said I would like to sell them on account of it being inconvenient for me to manage a run situate a long distance from it.

187 Q. How long had you owned them?

A. I owned them, I had half interest in them from the preceding November and I had taken over the whole interest in the preceding May.

Q. About 6 months?

A. About a year, 8 or 10 months since I had first taken an interest, bought an interest in them.

Q. November to May is how many months?

A. I have a copy of the agreement in my pocket and can give you the exact date.

Q. You say you first bought in November?

A. I can give you the exact dates if you let me look at this copy of the agreement that I have here.

Q. Well you had owned them 9 or 10 months then had you?

A. Well the first agreement upon which I bought the half interest was in December, '96, the 8th day of December, and I got the whole interest, bought out Robaison and the partnership was dissolved, and I bought out Robaison on the 4th of the following May, that would be May, '97.

Q. May '97 and then from May '97 to the date of the contract you had owned the sheep?

A. I had owned the whole interest from that date, yes.

Q. What was your reason did you say for wanting to sell?

A. Because I was so far away it was inconvenient for me to manage a run at that distance.

Q. Had you made any money out of them?

A. I had not made a wool clip.

Q. What?

A. No, I had not made a wool clip, *I had not made a wool clip.*

Q. As a matter of fact you paid five or six hundred Pounds
188 for the half interest, did you not?

A. I paid about 700 Pounds for the half interest, yes. Then I put on about 2500 sheep after that which cost me four or five hundred Pounds, besides buying out Robaison's interest which cost me five or 600 Pounds. It cost me altogether between 1700 and 1800 Pounds.

Q. Had you ever been in the sheep business before?

A. No, not before I bought in with Robaison. I don't think I had any very considerable number of sheep, never had much to do with sheep.

Q. How old a man are you?

A. I am 38 now.

Q. What was it that led you going into the Hagey business and disposing of your other investments?

A. Because Cowert said he had a customer, to take it off my hands and I wanted to get out of Auckland, the business was flat then.

Q. What business was flat?

A. All.

Q. Was the sheep business flat also?

A. No, the——

Objected to as incompetent and irrelevant. Objection sustained.

Mr. McCLANAHAN: Go on with your answer.

Mr. ROBERTSON: I move to strike it out.

The COURT: The answer may be stricken out.

Mr. McCLANAHAN:

Q. Was it because that all business was flat that you went into the sheep business and bought these sheep?

Objected to as incompetent, irrelevant and immaterial. Objection sustained.

Mr. McCLANAHAN:

Q. Mr. Cowert knew that you wanted to dispose of your
189 sheep business?

A. Yes.

Q. And he informed you that he had a customer for the sheep is that it?

A. Yes.

Q. Did he say who the customer was?

A. Not at first.

Q. Had you met that cus-omer at that time?

A. I didn't know who the customer was at first.

Q. Had you met the customer at that time?

A. Well the customer afterwards turned out to be Mr. Ables. I had met him at that time.

Q. You think you had met him?

A. I was introduced to him by Cowert I think.

Q. Whereabouts?
A. At the Institute probably.
Q. What was his connection with the Institute?
A. He was one of the officials conducting it.
Q. Well be specific, what was he doing there, what was his duties?
A. Well I think he was treasurer and he was tending to patients and that sort of thing.
Q. What did Cowert and Kirkpatrick do?
A. Well, they seemed to be hunting for patients and tending to them and looking after affairs generally.
Q. Hunting for sheep ranches?
A. Well, I don't know. I have told you, I have told you all I know about it.
Q. When did you first speak to Mr. Ables about this suggested trade?
A. After Mr. Cowert had informed me that Mr. Ables would take the sheep from me at that valuation if I would go into the Hagey business.

Q. Now Mr. Cowert had informed you that he could find
190 a purchaser for your sheep; did he know the value of your sheep or the price of your sheep?
A. He did, I told him What I would take for them.
Q. In a trade?
A. No, cash.
Q. Did you tell him what you would take for them in a trade?
A. I only put a cash value on them.
Q. Well but you were going to trade were you not into the institute, have an interest in the Institute?
A. I told him the cash value and he wanted me to put that into the Institute.
Q. Well that is what you knew when you placed your cash value, your cash value on the sheep that that was going to be turned in for an interest in the Institute, did you not?
A. He said he would give me the market, and he would give me an interest in the Hagey business for that cash value, the same cash value as I put on the sheep, give me cash interest in the Hagey business for that value.
Q. When you put your cash value on those sheep you knew that you were going to get for them or for it an interest in the Hagey business?
A. No, I put a cash value that I would sell the sheep for, my lowest cash value and he wanted me to take it out in Hagey—in the Hagey business, of the same cash value. I didn't offer——
Q. And when you placed your cash value on the sheep you didn't know that you were going to trade the sheep for an interest in the Hagey business?
A. Well he said to put the lowest cash value I would take for them, and then he asked if I would take in lieu of the cash an interest in the Hagey business of that value.
Q. Is that the first time that the interest in the Hagey business was suggested to you, or did you know of it prior to that time?

A. No, he said that he wanted to know the cash value, what
191 I would take for cash, before he had offered an interest in the Hagey business. First, he wanted to know what my lowest cash price would be, and then he suggested my taking an interest in the Hagey business of that cash value.

Q. Had you not commenced yourself to become interested in the Hagey business at the time that you had placed the value on your sheep.

A. No, I put the value on my sheep before I knew anything of the Hagey business.

Q. Before you knew anything of the Hagey business; then what were you pricing your sheep to the Hagey men for?

A. Because he offered to buy them from me for an interest in the Hagey business.

Q. He knew you had some sheep and offered to buy them from you for some interest in the Hagey business, is not that it?

A. Yes, sir.

The COURT:

Q. So that you did know at the time you put the cash value on these sheep that he wanted to give you in exchange for them this interest in the Hagey business?

A. No, he asked me what I would take for cash, first, then when I told him what I would take he made a proposition about the Hagey business.

Mr. MCCLANAHAN:

Q. Was this talk about the value of your sheep and exchange for your sheep and interest in the Hagey business at one conversation?

A. No, it ran through several conversations.

Q. You had become quite intimate with Cowert had you not?

A. Well we were sitting at the same table in that boarding house and we often talked about it.

192 Q. Well now, Mr. Harrison, is it not true that you interested yourself in the business and had offered to Cowert to go into the business if you could dispose of some sheep that you had?

A. No, it was his proposition that I should dispose of the sheep to his customer and go into the business.

Q. And when he did that he knew that you wanted to go into the business?

A. He knew that I wanted to go—sell the shepp because I told him, and what I would take for them.

Q. And knew that you wanted to get into the business?

A. No, I don't think he knew that. I would rather have the cash than go into the business proposition, but it was he who wanted me to go into the business. He didn't know that I was anxious about it.

Q. How long had your sheep been for sale?

A. Well after I got the title to them I wanted to get rid of them, as soon as I had a good opportunity for putting them on the market. I didn't consider that I had a good opportunity all that winter. It

is winter down there when it is summer here; July and August is winter months, and it was not a time when I could show anybody or sell. I thought I would have to wait until the following summer when the sheep were rounded up before I could sell them properly, before I could show them to a person in any way that one could get at their true value at the time. I had not been anxious to sell the sheep all through the winter, although they were for sale if I could get a reasonable price.

Q. Did Cowert know where the sheep were when he offered to sell them for you?

A. I told him where they were.

Q. Did you tell him how far they were from Auckland?

A. I did.

193 Q. What kind?

A. Yes.

Q. And what did he say about all this information about the sheep; want to look at them?

A. Yes sir.

Q. Did he look at them?

A. No.

Q. Why not?

A. Well he said he would take my word for it.

Q. Is that all he said, I will take your word as to the number of sheep and the kind of sheep?

A. Well, it was first of all arranged that I and he or one of them should go up and look at the sheep, and they said that they thought it would be all right, they would take my word for it.

Q. What kind of a man is Cowert? a countryman of yours, an Englishman or an American or what?

A. He told me he was an American came from Texas.

Q. You also had a lease that was going with this flock of sheep?

A. Yes.

Q. Did you tell him about the lease?

A. Yes.

Q. What did you tell him about the lease?

A. I told him that Grace had the lease and he wanted to sell it to me at a price and that the Government had informed me that they would not put the land up for sale, either for lease hold sale or free hold sale, without Grace's consent, that Grace's lease was practically an indefinite one, and that he had spent a lot of money in getting his title to the land, but the Government, when I requested them to give me a definite 21 years' lease, had said that they would not without the—change the title to the land without Mr. Grace's consent, or without Mr. Grace's assignee's consent.

Q. Now what kind of a lease was this you had been telling Mr. Cowert about?

194 A. It was a year to year lease which the Government would not—which the Government refused to change except at the holder of the lease—that is, the Government were not prepared to change the tenure unless the holder of the lease wished it changed.

Q. The tenure was then from year to year?
A. And as long as the holder of the lease wished to keep it so.
Q. What is that?
A. From year to year for as long a time as the holder of the lease wished to keep it so. That was not in the lease but the Government informed me that that was their position in the matter.
Q. I see that was not in the lease?
A. The Government man who informed me as to the Government's position, had authority to make agreements of that kind by act of the Auckland legislature.
Q. You say that Grace had signified his intention of selling it to you?
A. I had an agreement from him that he would sell it.
Q. Had you already promised to sell it to Cowert——
A. I told him——
Q. Wait a minute. Did you get it from Grace?
A. No, I had an agreement that Grace would sell it to me and I undertook to put the Hagey people in the same position I was in. Grace would sell it to me or any assignee of mine for the same terms.
Q. Did you show Cowert or Kirkpatrick any of the leases?
A. I think I showed them a copy of the documents I had.
Q. Do you remember what the rental was of the lease?
A. I think I have a copy of it here.
195 Q. Refresh your memory then from the copy of the lease?
A. It was 60 or 80 Pounds a year, I am not sure which No, I have only got a copy of—what is this—No, I have only a copy of Grace's agreement to sell the lease. I have—I forget what the exact rental was. It was not worth much on account of the amount of money that Grace—it had cost him to get the lease originally—the Government gave it to him cheap.
Q. This is all that Cowert required of you, to know what you have stated about the lease and about the sheep?
A. I told him all that I knew.
Q. What is that?
A. I told him all I knew.
Q. You have told the jury all that you told him?
A. All that I remember.
Q. And he said it was all right he would take your word for it?
A. Yes sir.
Q. Well, now, when did he report to you again Ables' willingness to take these sheep?
A. Well before he said it was Mr. Ables had agreed to take the sheep, they were intending to send a man up there along with me or one of themselves to go up and look at the sheep, until the last moment, and it was only shortly after the final agreements were signed that they decided to dispense with viewing the sheep. I told him all that I knew about the sheep, much more than I remember now.
Q. Did you have a talk with Ables before the trade?
A. Yes, sir.

Q. What talk did you have with him?

196 A. The first conversation with him, I asked if he was getting out of the Hagey business and going to take the sheep an- he said he would rather *a*have the sheep run, that he had difficulty with his partners and if he could get the sheep he would be willing to take the sheep.

Q. He evaded your question?

A. He said he was willing to take the sheep.

Q. He evaded your question?

A. He evaded my question. He told me he was going to go out of the Hagey business and take the sheep in lieu of his interest. That is what he told me first.

Q. What did he tell you second?

A. After I came back from Sidney the first time he told me he had made different arrangements.

Q. Tell us all that he told you about entering into the business?

A. That is all that I remember. I asked him if he was satisfied with the arrangement and he said he was, that is the arrangement set out in the agreement.

Q. That is before the first contract was signed?

A. Yes, sir.

Q. Did you have any other conversation with Ables?

A. Most of my conversations were with Cowert, and Kirkpatrick but I made a practice of talking with Mr. Ables and finding out if he had agreed to what they said he had agreed to.

Q. Answer my question, if you had any other conversations?

A. I had several conversations.

Q. After the first conversation; just relate what those conversations were?

A. Yes, sir, I had several conversations.

197 Q. You had three?

A. Well, I don't think very many, I don't remember what they were. Most of my conversations were with Cowert and Kirkpatrick, but I made a practice when they said Ables would do a thing in connection with this matter of seeing Mr. Ables and asking if that was so and he invariably assented that it was. I didn't have much conversation with Ables.

Q. Your dealings were with Cowert and Kirkpatrick?

A. Yes, sir.

Q. Principally. When you made this contract, taking into consideration the statements made by Cowert and Kirkpatrick in regard to the Hagey business you had satisfied yourself as to the advisability of the trade.

A. Under the terms of the agreement, that they would give me stock of the market value of 2000 Pounds, if I was dissatisfied.

Q. You thought——

A. I thought that was very necessary.

Q. You thought that abundant protection?

A. I didn't know the nature of the business and I thought it would be proper.

Q. They didn't know the nature of your sheep business did they——

A. Yes, I did.
Q. Except what you had told them?
A. I knew all about the sheep, I had seen them and handled them and spent weeks up there.
Q. They had opportunity to know all about the thing that they were trading you?
A. They did.
Q. So you thought you would protect yourself by putting in clause 4?
A. Yes, sir.
198 Q. And could afford to take chances on the proposition?
A. I though- the people were good for the money in case the Hagey business did not turn out satisfactorily.
Q. Who was it that represented, if any one, that they were good for the money?
A. Well I think they all represented it.
Q. Who?
A. Well, I think that all that I spoke to about it and I spoke to Ables, Kirkpatrick and Cowert and Kirkpatrick too, also Ables, and I think they all informed me that they were good for it.
Q. Good for what?
A. 2000 Pounds, stock of the market value of 2000 Pounds, that said that they would have to hold that on hand, for their own partnership agreement for that amount, in regard to Auckland, to pay it, that they would have to hold what they might have to pay during the six months that the option remained open.
Q. As a lawyer, did you ask then to see the stock that they had? You said they would have to hold the stock, now what stock did they refer to? Did you ask them to let you see the stock?
A. They said that they had an interest more than that value in a new company formed to work in New South Wales.
Q. They had what?
A. They had stock of more than the market value of 2000 Pounds in a new company they had formed to work in New South Wales, and they would save a one fifth interest in that with 5000 Pounds cash.
Q. You knew that didn't you?
A. I was informed so by several people.
Q. You inquired before you made your contract?
A. Yes, sir.
199 Q. And found that was true?
A. They had saved a one fifth interest in New South Wales.
Q. Did you find that out that they had any other stock that you could get under the 2000 Pounds contract?
A. They said they were going to form a lot of companies and they would have plenty of stock on hand before the six months was up.
Q. They had not formed these companies but were going to?
A. Yes, sir, they said they had private stock of their own.
Q. In what?
A. In various things, that they had made money and that money was invested in stocks down there which they were holding.

Q. Who said that?
A. Well, I know Kirkpatrick did for one.
Q. And it was the intention to give you 2000 Pounds of any kind of stock?
A. Of any kind of stock if I were dissatisfied.
Q. Bank of England stock?
A. Any kind of stock.
Q. Did Mr. Ables say that he had any stock?
A. I don't remember whether Ables said that or not; Cowert and Kirkpatrick did; Cowert was the one that I had most of the dealings with.
Q. Now if they were going to give you any kind of stock what did you put in the expression "in some other field of the Company's operation" for?
A. They put that in.
Q. Well, you signed the contract?
A. They put that in, *that* wanted it put in in that way.
Q. As a matter of fact Mr. Harrison it was understood that if you didn't like this particular field you could have the same
200 interest in some other field if you were dissatisfied?
A. I could have an interest of the market value of 2000 Pounds, something that you could sell for 2000 Pounds.
Q. In some other field?
A. They said they didn't know where they would be at the end of six months and they didn't know where the money would be invested but they would have property at different places in the field of operation that they might be in and at that particular place they were prepared to offer the stock wherever they might be.
Q. That was the understanding, if you didn't like Tasmania you could go to some other field of operation?
A. They would be in some part of their field of operation outside of Tasmania, if Tasmania wasn't satisfactory, and at that place, wherever they were would be holding stock and they would give me stock of that market value.
Q. In that Company?
A. No, they would give me stock of the market value——
Q. Why did you put in the Company's field of operation?
A. Because they would be somewhere in the Company's field of operation. They said that they wanted to have the option of giving it to me at any place they might be.
Q. They might be holding bank stock in some town other than Tasmania and they, if you desired, could give you that stock?
A. They could give me that stock. They had the option of selecting what stock they would give me, the only qualification it had to have was, that it would have to have the market valuation of 2000 Pounds.
Q. Did the Company stand well in Auckland?
201 A. Well, it did at that time.
Q. At the time you made the deal?
A. Yes, sir.
Q. Any patients at the Institute?
A. Yes, sir.

Q. Did you see any cures being perfected?

A. They told me of one or two people that they had treated successfully.

Q. Did you investigate the truth of that statement?

A. I found that they had sobered them up.

Q. This contract was formerly signed, as now sued on, on the first of October?

A. Yes, sir.

Q. 1897?

A. I don't think Gilmore signed that day, I think Gilmore signed the day after the rest of us signed it.

Q. The first two contracts did not require you to stay in Tasmania five or six months trying the business?

A. The first two.

Q. Why was it—who was it that put in the words there "on or before"?

A. I said I wanted it so. Besides I didn't wish to be obliged to remain there five or six months, and I wanted an option of going away as soon as I could make it go and suggested those two words "Or before" should be put in and Cowert said, I r-member, at the time now "Harrison if when you get those instructions if you come straight back I will never forgive you."

Q. This fund of 200 Pounds was raised before you left was it not?

A. Well it was sent to me, their share of 110 Pounds that they paid was sent to me at Sidney along with the instructions and the medicines.

Q. When did you contribute your 80 Pounds in cash?

A. Well, I contributed it, I put my share in I suppose as
202 soon as we got to Tasmania. I didn't keep my own moneys—
I didn't separate my own portion of the money from my private funds until we got to Tasmania.

Q. Who was the custodian of this 110 Pounds?

A. I was until the 11th of February when I handed it over to Gilmore.

Q. Until when you got where?

A. I say until the 11th of February, '98 until I handed it over to Gilmore, I had spent most of it.

Q. When you got the 110 Pounds did you take 80 Pounds of your money and keep it separate?

A. I did not keep it separate, I did not add my money to it until I got to Tasmania.

Q. When did you get Gilmore'- 10 Pounds?

A. Gilmore never paid his 10 Pounds. It was deducted from his salary.

Q. That was in violation of the contract was it not?

A. Well was never paid in cash, that is the point.

Q. What did you pay yourself in cash?

A. I paid 40 Pounds of it in cash.

Q. Didn't you state upon your direct examination that you paid $80 in cash?

A. I deducted 40 Pounds being salary. I don't think I advanced more than 40 Pounds in cash because there was 40 Pounds salary coming to me.

Q. You broke the contract when you did that, did you not?

A. Not at all. The fund was raised to start the business and salaries had to be paid out of it.

Q. Salaries were to be paid out of receipts from the business after payment of expenses, were they not?

A. They were to be a certain charge on the business.

Q. Then you broke the contract did you not when you took
203 the *the* salary out before there were any receipts?

A. No.

Q. Explain why you didn't?

A. They insisted on O'Brien's salary being paid out of that fund and I didn't know why the rest of ours should not.

Q. Why didn't you break the contract when you took your salary out of that fund to establish the business before there were any receipts?

A. I didn't consider I broke the contract. They insisted on O'Brien's salary being paid out of that fund and I considered the rest of us was in the same position. It was understood our salaries were to come out of the fund if the receipts of the business did not furnish them.

Q. How many salaries were paid to you out of this fund?

A. I think I only got one month, 40 Pounds.

Q. You say you got that at Sidney?

A. No, I got it at Hobart. I gave a statement—there is a statement of how the funds were disposed attached to Gilmore's deposition. It is a statement I prepared at the time I was leaving Tasmania, at the time I handed the balance over to Gilmore, the balance over to Gilmore.

Q. But you were longer in the business than one month?

A. Only in Tasmania one month. Gilmore was there before.

Q. But still you were drawing your salaries?

A. No, I only drew one month's salary at the time I was in Tasmania.

Q. Didn't Gilmore draw another month?

A. Gilmore claimed another month, and I didn't give it to him but I have him half of it afterwards out of my own pocket.

Q. He made you pay that before he would testify in this case didn't he?

A. Yes before he would sign his deposition. He said I
204 promised to pay it. We settled for half of it finally.

Q. Did you know anything about the treatment of patients before you got these instructions?

A. Nothing more than what they told me that it was a sure cure and they had very small percentages of relapses.

Q. Did you know anything about the treatment of patients before you got these instructions?

A. They told me that they gave them a tonic 8 times a day and hypodermic injections 4 times a day.

Q. What kind of tonics?

A. Some simple remedies that they had unknown to the medical profession.

Q. That turned out to be true didn't it?

A. No the medical profession seemed to know all about it.

Q. How do you know that?

A. The Doctors told me that the ingredients of the Keeley Gold Cure were published in the papers in Chicago and set out in the medical books.

Q. You assumed that the same formula that these gentlemen had and made money with and which they said was secret was the same formula as the Keeley Gold Cure?

Q. They told me it was practically the same as the Keeley Gold Cure.

Q. What is your basis for saying it was known to the profession, from what they stated?

A. The doctors told me so.

Q. How did you know what to tell them so that you could say what was known?

A. They told me the ingredients used in the Keeley Gold Cure and said I would find them the same when I received those instructions.

Q. Did they tell you the ingredients used in the Hagey Business were known?

A. They said I would find them the same——

205 Q. How could you find them the same?

A. If it were like the Keeley Cure it was known to the medical profession because they said it was practically the same as the Keeley Cure.

Q. You saw the treatment being administered, did you at the institute?

A. I saw that after I returned from Sidney the first time, I saw some patients treated.

Q. Did you see it before you went?

A. I don't remember. I had seen some patients take their tonic. I don't know whether I had seen the injection.

Q. Did you see Mr. Ables give some injections?

A. I did after I returned from Sidney the first time.

Q. Before, before you signed the contract?

A. No, after I signed the contract, before the 17th January.

Q. Did you see him do it before?

A. I don't remember seeing him do it before. Gilmore was up there I believe but I don't think I was.

Q. Well, now, how did you know what the Keeley Cure was?

A. Before when I went to Sidney, I told—I met a man there that I had known in Canada and told him what I had gone into and that I was to get these instructions and medicine by the next steamer, and he said, why, I was in the Keeley Cure some place in St. Louis, and took treatment there, and I afterwards helped to treat patients and he said the whole thing is a dope, when they give them a drink of whiskey they give them something to get them sick and tell them it

is the whiskey that makes them sick and they give them a few tonics to brace them up.

206 Q. This was the first——

A. This was between the time that I left Auckland on the 4th or 5th of October while I was at Sidney before I received the instructions. He told me that I would find by the instructions they used emetics, and told the patients that the effect of the emetic was the effect of the whiskey.

Q. So you were being deceived already?

A. I told them that there was nothing of the kind in the treatment, that they had assured me that such was not the case and he said I would find out when I got the instructions.

Q. And did you find out?

A. I did find out, yes.

Q. And that is all you know of the Auckland cure?

A. Well, that was the first I had been told I remember of being told that emetics were being used in the Keeley cure.

Q. I am asking you if that is all you knew of the Keeley cure?

A. I talked to doctors about it since then.

Q. At the time you signed the contract?

A. Later I had heard about the Keeley Cure from other people.

Q. Favorably or otherwise?

A. Well I don't know that—that—I heard that it was a going concern in the States and I have never heard of it being successful in any way before in the British Empire.

Q. And these men said it was like a Keeley cure?

A. Yes, they said it was a great success in the States and they told me a lot about it, that they had been successful with this cure, for instance and made a lot of money.

Q. Did you ever hear of the Keeley cure except what they told you?

A. Yes, sir, I had heard of it in the States before I ever went to Auckland.

207 Q. Successful or not?

A. I heard that some people had been permanently cured by it and others were not.

Q. Did these men represent that this was a permanent infallible cure for drink?

Q. They represented that a very small percentage of people they treated ever relapsed and it put them in the same position that they were in before they ever took to drink.

Q. And that it was very much like the Keeley cure?

A. And that it was very much like the Keeley cure.

Q. You were looking then when you got these instructions you were looking for confirmation of what these men told you about emetics?

A. I did not believe I would get confirmation about it and tried.

Q. But you did look for it, looked to see what was there?

A. Well I saw the instructions and concluded that he was right certainly.

Q. Well, now, what was your objection, Mr. Harrison, to the giving of emetics?

A. Well, I don't think that the business would be successful, I didn't think there was any secret about it, I considered the medical profession would consider it a sort of humbug, and it wouldn't be successful the way things were going in Tasmania, and as a matter of fact it was not the secret that it was represented to be.

Q. That is was not the secret that it was represented to be and that it would not have the infallible curing effects that these people represented it would have on account of the use of emetics?

A. As emetics were the only thing used were the chief things used to restrain people from using the narcotics.

Q. You mean to say that simply because the instruc-
208 tions called for the use of an emetic that you concluded that you could not make a success of it?

A. From that and from the fact that I did not have—yes, from the fact that the emetics seemed to be the only means used for breaking the people of the habits of which they wanted to be cured, I did not think it would be a permanent success.

Q. Well, now, you say it was a success in Auckland, did you not?

A. It straightened people up for a time, I saw that.

Q. Did they relapse before you went away?

A. Some of them had but I don't think many of them had at that time.

Q. So you knew when you entered into the contract that some had relapsed?

A. I knew that there had been a case or two of relapses.

Q. So you knew that at the time when you entered into the contract?

A. Not at the time that I assented to the contract, but between the time of the signing of the contract before the time I left I knew there had been a case or two of relapses, in fact, Robaison had been down to see me off the night before the 4th October and he told me some story about some relapses. He told me I had been taken in.

Q. Seeing you off where, where were you going?

A. When I went to Sidney the first time.

Q. Where were you going?

A. I was intending to start for Tasmania.

Q. That is where you were making for?

A. Yes, sir.

Q. What was the date of that?

A. About the 4th October 1897.

Q. Had Gilmore started yet?

209 A. No, Gilmore was to come a few weeks afterwards.

Q. So that was the time you started to carry out this contract and departed for Tasmania?

A. Yes, sir, that is the first time, I came back after I got the instructions.

Q. So that you had the right to become dissatisfied from that day any time within six months with the condition of the business in Tasmania?

A. Well, I did not consider that I really started for Tasmania until the 17th of January, for the simple reason I intended to go to Tasmania, it ended up in a false start and I came back before I got there.

Q. You just testified that you——

A. I intended to go.

Q. And started with the intention of going?

A. But I did not carry out that intention.

Q. Is not Sydney on the way to Tasmania?

A. Yes, I came back from Sidney.

Q. You got as far as Sidney. How far is that from Auckland?

A. About 1200 miles.

Q. You got 1200 miles on your journey to Tasmania?

A. Yes, sir.

Q. That was a false start was it, the 1200 miles?

A. Well I never got to Tasmania.

Q. Well, you got 1200 miles nearer than from where you started?

A. I have to get to the place before I can say I started for it.

Q. How far is it from Sidney to Tasmania?

A. About another 1200 miles to Hobart.

Q. Only 1200 miles more, is not that right?

A. Well it is 600, it depends which way——

210 Q. You go?

A. It is 11 or 1200 miles—about 18—800 miles overland, 8 or 10 by overland and 13 or 1400 miles by the direct sea route.

Q. From where?

A. From Sidney to Hobart.

Q. How long did you stop in Sidney?

A. Until I received the instructions, about a week or 10 days, about a week I think it was I got back——

Q. You have spoken of the deception as revealed by the instructions?

A. Yes.

Q. Did the deception so practiced upon you please you?

A. It certainly did not, it made me very much dissatisfied with my bargain.

Q. Was that one of the reasons you wanted to get out of it?

A. Well it is—it made me dissatisfied with the bargain and that was the reason I went back to Auckland to get—try and get relieved of the bargain, certainly.

Q. You didn't want to be a party to what you called a humbug?

A. I don't think the business could be made successful.

Q. Answer my question, please.

A. Not unless I tried it and it would turn out much better than I could anticipate I don't want to be a party to it.

Q. If it turned out to be financially successful you were willing to be a party to the humbug?

A. If it turned out and cured people as well as they represented it would cure people I should certainly have thought it was worth practicing.

Q. You know that it don't cure infallibly?

A. They had not told me so; as I said, I heard of one or two cases that had relapsed before I left.

Q. And if it was not successful financially you didn't
211 want to be a party to the humbug?

A. I didn't want to be a party unless the thing could be made to do what it was represented to be.

Q. The question then for you was dollars and cents?

A. A question of dollars and cents and also of making an honest contract with patients. I didn't want to treat patients unless I could cure them.

Q. You didn't want to make a dishonest contract with your patients

A. No.

Q. And you thought under your instructions that your contract would be dishonest with your patients?

A. Not necessarily.

Q. What did you use the word "Dishonest" for in connection with your contract with the patients, what did you mean by that?

A. Unless the thing turned out to be as good and cured as they represented it I should not have liked to carry on the business.

Q. What did you mean by making a dishonest contract?

A. If I afterwards found it would not cure them I would not make a contract with patients to cure them when I knew it would not do it that is all.

Q. You were then convinced, were you not, after reading those instructions and after listening to the rumors in the air that the contract with the patient would be a dishonest one?

A. No.

Q. Why not?

A. Because if I found out from the instructions everything to be correct as the Hagey people represented and they could cure patients
according to those instructions, the contract would be quite
212 honest I should say.

Q. In other words you thought the misrepresentation would be justifiable if you could cure a man?

A. If they could cure him as they said they would cure him so that he would never have any desire to go back to it.

Q. Did you think that at the time you read the instructions that the misrepresentations would be justifiable if you could cure the man?

A. Well, I don't remember what reflections I had on that point.

Q. We would like to know just how you felt about the matter at this particular time?

A. I didn't think the treatment would do for patients what they had been representing at Auckland it would do for them, that a man that was cured in that way would be cured from the desire to return to the habit, he might think he was for a little while.

Q. Mr. Harrison, did your view of the efficacy of the whiskey treatment ever change?

A. Which view.

Q. The view you have been giving to this jury that it was a humbug?

A. After the—after I had received the instructions?

Q. Yes, did it ever change after that?

A. No, I don't know that it is materially changed.

Q. As a matter of fact you went back to Auckland and tried it on a cook, didn't you and demonstrated that it was a fraud from beginning to end?

A. I didn't succeed in curing him.

Q. What?

A. I didn't succeed in curing him.

Q. Well, you went back there to demonstrate whether it was *bona fide* or a fraud?

A. Well, I tried to the best of my own ability to cure the
213 man but didn't succeed.

Q. What did that do, or didn't that strengthen your disbelief in it?

A. Well it certainly wouldn't strengthen my belief in it.

Q. How long had you been in Auckland before you tried this treatment on this cook?

A. Well, I got back to Auckland about the 1st of November and it was sometime between that and Christmas that I tried it on the cook.

Q. What made you try it?

A. Well the lady of the house said she had a cook and he was in the habit of going on a spree and she would like me to try and fix him up, she would do all that she could to make it pleasant for him at the house and I could give him the medicine.

Q. Did you give him an emetic?

A. No, I didn't give him any emetic.

Q. You tried the honest way of treating him without misrepresentation?

A. After a few doses he went on a spree and wouldn't take anything. He said he didn't want to be made sick.

Q. You didn't make him sick?

A. He would not give me a chance somebody had told him.

Q. What was your reason for this experiment?

A. Well, I just wanted to try the effect of it, effect of the treatment.

Q. What was your reason for going back from Sidney to Auckland?

A. I wanted to get free of the contract and get my sheep back.

Q. And you considered at that time you had become dissatisfied with the condition of the partnership business?

214 A. I was dissatisfied with the thing as far as it had gone.

Q. Please answer my question?

A. In so far as the business had gone I was dissatisfied.

Q. Under the terms of the contract you had become dissatisfied as you had a right to become?

A. Well, I considered I had a right to become dissatisfied at that time.

Q. So it was on that theory of the contract that you went back to demand your 2000 Pounds.

A. I went back trying to get out of the contract the best way I could.

Q. Didn't you demand the 2000 Pounds when you went back?

A. Or the sheep.

Q. Leave out the "or," didn't you demand the 2000 Pounds?

A. Yes, sir.

Q. So you were acting under your contract when you went back?

A. Certainly.

Q. Were you acting under legal advice?

A. I consulted two or three lawyers about it and got their opinions.

Q. Where?

A. At Auckland.

Q. Who?

A. Well, the first of all I spoke to was Mr. Carter and I went to Parr.

Q. Before or after the instructions came?

A. After the instructions as to what they—what my exact right was.

Q. Why did you go from Carter to Parr?

A. Well Mr. Carter and I didn't get along as well together as I and Mr. Parr.

215 Q. Why not?

A. For various reasons.

Q. Didn't Mr. Harrison, didn't you want Mr. Parr to bring an action for you on the contract and he would not do it because you had not done your part?

A. He said that he did not think—he thought I ought to go and give it a trial before I should bring action although he had no doubt that the facts were as I stated, it would be very difficult for me to prove these people had represented the nature of the business to be different from the instructions under it, on that ground he thought I ought to give it a fair trial before I should pass upon it.

Q. That was the cause of your going to some other attorney?

A. Then I talked it over with Parr.

Q. Mr. Carter's advice didn't meet with your wish to bring action at once?

A. Well, I didn't know whether to bring action at once or go and try it. I wanted to get the matter settled.

Q. You wanted to settle the matter before you gave notice of dissatisfaction and consulted your attorney?

A. I wanted to get out of the contract, either to get my sheep back or to get the money out of it, the best way I could.

Q. So after you got those instructions you began to act under medical advice?

A. I took advice as to what they thought my rights were, I didn't care to rely upon my own judgment in a matter in which I was so largely interested.

Q. Mr. Parr told you?

A. Well Parr said he would bring action but he said he thought it would be difficult to prove misrepresentation and he thought it would be better for me to go and give the thing a trial—and make sure what it was really worth.

216 Q. Well did you do that?

A. I did.

Q. I thought you went back to Auckland?

A. I went on to Tasmania when they finally refused to return me the sheep.

Q. No, I am talking about Mr. Parr's advice to you at the time just after the receipt of the instructions?

A. Well I had to go back to Auckland before I saw Mr. Parr, Mr. Parr was at Auckland.

Q. Mr. Parr was out at Auckland?

A. I didn't take any legal advice in Australia.

Q. Before going back to Auckland from Sidney you say you went to Mr. Carter?

A. Yes, sir.

Q. The first time, before ever you telegraphed to people that you thought might buy the sheep not to buy them what was that for?

A. Because when I opened the instructions I thought that those people if they had played a trick of that kind on me would try to put the property in such a way that I could not get at it. I had no idea that Mr. Ables had wanted to sell the sheep before I went to Sydney. But when I saw the instructions I concluded that they must rely upon putting their property in such a position that I could not get the money out of them or I would never have gone into the agreement, so I telegraphed to people not to buy the sheep, that I was returning.

Q. When you sent these telegrams you still had no other information on the question of the purchase of the sheep by Ables *and* the information you first had, namely, that he was going to buy the sheep and run the ranch himself?

A. I had that idea.

217 Q. And in spite of that fact you still thought it a proper thing to telegraph the people over the country not to buy the sheep?

A. And what I could not understand, how he entered into such an agreement with me if they thought that I could collect the money of them because they must have anticipated that I would be dissatisfied, so I concluded.

Q. And you accommodated them and you became dissatisfied??

A. Well, I thought they must know that I would be dissatisfied before long with the thing, with the price I paid for it, and having talked the matter over I thought the only thing to do and action to take would be to get the property, get the sheep, I could not attach it, so I telegraphed to stop the sale of the sheep so that I could get hold of them.

Q. Where did you meet Robaison, Wellington?

A. At Wellington, New Zealand.

Q. And he told you that he had bought the sheep?

A. Yes, sir.

Q. He was the fellow that knew more about the sheep than anybody else did he not?

A. He was the man that I bought the sheep from. I don't know whether he knew more than anybody else; he knew all about them.

Q. Didn't he run a ranch?

A. He ran the Ranch himself.

Q. He knew more than you did or anybody else?

Q. There were other men that had run the ranch besides him.

Q. Under him, was it not?

A. There was a partner ran it along with him.

218 Q. It was his business at that time, sheep raising?

A. Yes, sir.

Q. And he told you he had bought the most valuable thing that you had, the sheep?

A. For the price of the wool on their backs that he got.

Q. You didn't say that in your direct examination?

A. He told me, you have sold them for the price of the wool on their backs.

Q. What was their price?

A. Because he told me it was worth that, you should get 500 Pounds cash, that they had that much wool on them.

Q. He thought he had a good thing?

A. Yes, sir.

Q. Mr. Harrison, didn't you hear Mr. Ables say that he got the names of people after the trade to whom to write as possible purchasers for the sheep?

A. He is altogether mistaken, he got from me the names of people who knew something about the sheep if he wanted to inquire about them.

Q. Who were these people that you telegraphed to?

Q. I think I telegraphed to one Jansen at W. the fellow with Jansen & Co.

Q. Had you given their names to Mr. Ables?

A. I told him that they had purchased the wool the last year's crop.

Q. Who else did you telegraph to?

A. They were also the people, they were the commis-ion merchants who sell that class of sheep, they were the right people to go to if the sheep were to be put in the market, if they were to be auctioned.

Q. Who else did you telegraph to?

A. I think I telegraphed to a man named —— —— who is about 40 miles from our run, on the neighboring run and knew

219 something about the sheep.

Q. Robaison laughing in his sleeves that he had got such a good trade?

A. He was.

Q. When you got back to Auckland why was it that you stopped there so long before starting on again?

A. Because they said they would get the sheep back for me.

Q. Get the sheep back from Robaison?

A. Yes, sir.
Q. The fellow that had got the good trade?
A. Yes, sir.
Q. And you believed that, did you?
A. They said they were willing to lose a few hundred Pounds in order to give me my sheep back.
Q. Answer the question?
A. I doubted it very much but thought they might.
Q. But it was on that statement that you staid in Auckland so many weeks?
A. I staid until the 17th January, from about the 1st of November to the 17th of January.
Q. From about the 1st of November?
A. Yes, to the 17th, 1st of November until the 17th of January.
Q. Two months and a half and more?
A. Yes, they kept me there saying they were negotiating and they thought they would manage it.
Q. How did they keep you?
A. By practically promising to get the sheep.
Q. Who were the men that promised?
A. Cowert and Kirkpatrick, chiefly.
Q. Did they *rp*omise to give you back the run?
A. They said they would get the thing back.
220 Q. You thought that so, that they would get back the run?
A. They said they would get back the whole thing, that I had signed a deed for, and place me as I was before.
Q. In these two months and a half did you have occasion to see Robaison the purchaser of the sheep and run?
A. I don't remember if I saw him during those two months and a half or not.
Q. Did you write to him?
A. I had some communications from him. I am not sure whether I communicated with him or whether Cowert showed me the communications that he had received from him.
Q. Were you doing anything during the few months that you were waiting for them to get your sheep back?
A. Robaison wanted 1000 Pounds for his bargain.
Q. Answer the question please?
A. Well I was waiting I went up to have a look at the sheep to see whether any of them had been taken; if they were in same condition as they were when I sold them, or anything had been done.
Q. You did nothing but wait?
A. We were consta-tly having meetings in Mr. Parr's office and other places and they promised to get the sheep back at a certain date and we would wait for that date, and they would promise to get them back at a later date.
Q. Was Mr. Ables up at Mr. Parr's office?
A. I think Mr. Ables was at one meeting in Mr. Parr's office, I would not be sure, I think he was there. Cowert and Kirkpatrick were the ones that did most of the negotiating.

Q. Did you go to the Institute during the time that you were waiting for the sheep?

A. Yes, sir.

221 Q. The contract did not provide that you should get your sheep back in case of dissatisfaction?

A. They said they were willing to cancel the contract to get the sheep back.

Q. And you were willing?

A. If they would get the sheep back.

Q. So you were willing to waive your contract?

A. I was if they would get the sheep back.

Q. Well I understand that your patience wore out and you finally, on the advise of a lawyer, you started again for Tasmania?

A. I finally started again for Tasmania. I don't know whether I was advised to do so or not, I don't know. Mr. Parr advised me that it was the best thing I could do, yes.

Q. He advised you did he?

A. Yes, sir.

Q. Did you advise with him before going?

A. I did.

Q. What did you advise?

A. Well I told him if I became dissatisfied—I wanted him to keep me informed as to what the Hagey people in Auckland were doing, I didn't know whether they were likely to leave and clear out so that I could not find them, so that if I became dissatisfied with the business in Tasmania I might know where to find them, and I told him if I became dissatisfied I would cable him at once to that effect and that he was to act, conserve my interests as he thought best.

Q. What cable were you to send him?

A. I think I told him I would cable him the word dissatisfied if I were dissatisfied.

Q. So you left Auckland with the understanding with your attorney that if he got the word dissatisfied in a cable he should do what?

222 A. He should protect my interests as rapidly as possible by notifying all the people as my agent that I was dissatisfied but by making a claim for the stock of 2000 Pounds market value and by enforcing it by legal proceedings if necessary.

Q. Did he protect your interests?

A. As far as he could. They had all gone by the time I became dissatisfied, they had all left.

Q. Was not that his business to look out and see if they got out or not?

A. I think he did advise me that they were leaving.

Q. When?

A. At the time before I had been in Hobart for the full month of February.

Q. Before you had been there for a full month?

A. Yes, sir, before I had been there until the end of February.

Q. Did he cable you?

A. Beg pardon?

Q. Did he cable you?
A. I think he wrote me a letter.
Q. What did he say?
A. Stating that they were leaving, something of that kind, I forget exactly the details of it, I know I was told before I got back.
Q. Did you immediately cable him at first?
A. I did at the end of February, when I was leaving Hobart I cabled him that I was dissatisfied.
Q. With reference to the receipt from him of this letter, when did you cable him the word "dissatisfied"?
A. At the end of February, when I commenced the dissatisfaction. O'Brien——
Q. Please answer the question?
A. I think I cabled him the morning I left Hobart, that is my recollection.
223 Q. With reference to the receipt from him of this letter when did you cable him?
A. I don't remember exactly when I received that letter, it was about the 10th February some time, I did not cable to him until several days afterwards.
Q. Several days after you heard from him?
A. Yes.
Q. I believe you said you turned this fund over to Mr. O'Brien on February 11th?
A. To Gilmore.
Q. What did you turn it over for?
A. Because he said he was treasurer and wanted to get at the truth of the——
Q. I thought you said you were treasurer, you testified that you were treasurer of the business?
A. I testified and wish to have it appear that way, the agreement is that Gilmore was to be secretary and treasurer.
Q. You had the fund at the start?
A. I had the fund because I was the first to start out, to start the business.
Q. Had you when you left the second time for Tasmania any better opinion of the Hagey gold cure business than you had when you got those instructions?
A. Well, I don't know that I had any bet-er opinion of the business. I don't think that my opinion had been improved very much.
Q. Nothing had transpired during the two months and a half in Auckland to improve the bad opinion which you had of this humbug?
A. No there was nothing that transpired to make me satisfied with my contract.
Q. In fact you were still dissatisfied with it when you left?
A. Never during the whole time after I received those instructions did the business appear satisfactory to me.
224 Q. Well please answer the question. You were dissatisfied with it when you left?
A. The business did not seem satisfactory to me.

Q. Were you dissatisfied with it when you left the second time?
A. The business did not seem satisfactory to me.
Q. Will you please answer the question, yes or no, were you dissatisfied with the business when you left the second time?
A. Well, all I can say is, that the business was—I did not consider it satisfactory, I suppose that means I was dissatisfied.
Q. That is not the way you intend us to——
A. Yes, I did not consider the business satisfactory.
Q. That is the way you intend us to understand it that you were not satisfied with the business when you left the second time?
A. Well, as I say I did not consider the business satisfactory, I was dissatisfied, yes.
Q. Did you ever give these medicines—did you ever have—Did you ever attempt to make a contract for the treatment of alcoholism after you left Hobart?
A. I tried to get several people, yes.
Q. Tried to get people to go into this contract which you knew was a fraudulent one?
A. I did not consider it fraudulent.
Q. You knew it was a humbug?
A. I wanted to try and see whether we could cure them as the Hagey people represented, I doubted its efficacy, I didn't think there was anything wrong about it.
Q. You knew that in the practice of it *if* you had to de-
225 ceive the patients, don't you?
A. Yes, sir.
Q. And did you attempt to make contracts of that nature?
A. I would have made contracts and treated them in that way, yes.
Q. It went against you, did it?
A. Well, I didn't have any conscientious scruples on that score. I think if it cured them up properly it would do them more good than harm, they would get their money's worth. I didn't seem to have a fixed opinion in the matter.
Q. You called it a dishonest contract?
A. I suppose I was afraid it was before I tried it, I had come to that conclusion that it was dishonest, but I don't think it—I didn't know enough about it.
Q. Well you tried it after you went back to Auckland, did you not?
A. I didn't try it on a sufficient number of people to form an opinion as to the value of the cure.
Q. Yet two months after that didn't you go into the Hagey institute and demonstrate it there?
A. I had not treated patients myself. From having watched the results of the cure I don't think I was capable of passing an opinion as to whether the cure was worth the price that the patient would be able to pay for it.
Q. Did you make any effort during the two months and a half to find out whether you were wrong in that opinion?

A. Yes, sir, I knew several patients that had relapsed during the two months and a half.

Q. So the efforts that you did make only convinced you the more firmly that it was a humbug?

A. Yes, sir.

Q. But still you entered upon this business in Hobart in that frame of mind?

A. I entered into the business and tried to find out if I
226 could make it satisfactory and I tried all I could to make it satisfactory.

Q. Do you know when, Mr. Harrison, that it was unsuccessful?

A. I don't know when the business was unsuccessful.

Q. You do not?

A. When I got the instructions I felt sure it would be successful, at least, I expected it would be.

Q. And you lay low——

A. I did my utmost to make it successful. I was conscientiously determined to make it successful if it could possibly be made so.

Q. You have stated that when this fund was decided upon the members warned you that they would not pay any more money in, is that true?

A. Yes, sir, that is so.

Q. What was the argument they used in connection with the sufficiency of that amount?

A. They said it was enough and if I could not get started on that I would not get started at all, something to that effect; anyway they were not going to put up any more money and I had to make it go and if I knew that I would probably make better use of the money than if I relied upon getting more.

Q. Who was Mr. Gilmore, was he a side partner of yours?

A. He was—I found him suitable as a partner under the contract, yes.

Q. A friend of yours, was he?

A. I was very well acquainted with him.

Q. Did you advise Gilmore while you were there, two months and a half in Auckland that you were trying to get your sheep back?

227 A. He knew that I was trying to get out of the deal, I had told him.

Q. And he was down there then?

A. He had gone on, yes.

Q. What was he waiting for?

A. Until I would come down or get out of it and they would send somebody else in my place.

Q. He was willing to give the thing a trial?

A. Yes, sir. He went down because I promised to pay him a month's salary if he went. I told him that I had that much funds of my own in my hands.

Q. Will you please produce the demand for stock of the market value of 2000 Pounds in some other territory of the Company's field

of operation, which you say was put in writing, or a copy of it, if you can?

A. That letter that I sent to Kirkpatrick was the demand for stock.

Q. We are not talking about your letter, we are talking about the demand that you say was in writing?

A. That is the only demand that I remember making in writing except a writ in the New Zealand suit.

Q. Then you were mistaken, were you?

A. That letter I considered a demand.

Q. You didn't put any demand in writing?

A. I considered I made a demand when I wrote that letter. I said my demand was for 2000 Pounds or stock of the market value of 2000 Pounds.

Q. What is that?

A. I said in that letter that my demand was for stock of the market value of 2000 Pounds.

Q. This is your demand in writing?

228 A. That is the demand that I sent to Kirkpatrick, I made a verbal one before that and that is the written one.

Q. You said it was written, a demand for 2000 Pounds of stock in any other of the Company's field of operation.

A. Mr. Parr was making demands for me.

Q. What is that?

A. Mr. Parr afterward wrote letters making demands for me, before he brought the suit in New Zealand.

Q. Where are they?

A. I have not copies of them here.

Q. What is the name of the doctor you employed in Hobart?

A. I forget his name now.

Q. Did you ever remember?

A. Not since I have come to this country. I only saw him once or twice and made a bargain with him, but if I saw a list of Hobart physicians I might pick him out, but I forget the name now.

Q. What was your bargain?

A. He was to get a certain percentage of what we collected from each patient.

Q. What was it?

A. I am not sure, I think it was about 10 per cent., something of that kind, 2 Guineas out of 20 Guineas, or 25 Guineas, we were to charge for it.

Q. Was he a reputable man?

A. There was nothing against his reputation that I could hear, he was considered a good doctor there, considered a man who was a good physician.

Q. Did he know of the deceit you practiced on the patient or were to practice?

A. That matter was not discussed. He undertook to examine the patients and tell whether they were fit for treatment or not,

229 supervise the treatment.

Q. What kind of treatment?

A. The Hagey treatment.

Q. Did he know what the Hagey treatment was?
A. We told him that it was like the Keeley treatment, and he seemed to know all about it.
Q. You told him it was like the Keeley treatment?
A. Yes, sir, he seemed to know all about it, didn't want any further information.
Q. You were passing Cowert's statement along, were you?
A. Yes, sir.
Q. You didn't expect when you signed this contract to know the formula yourself, did you?
A. No.
Q. You had seen the articles of copartnership of the Hagey—African Pacific and Indian Hagey Company, had you not?
A. Yes, sir.
Q. And you saw by them that none of the partners knew the formula?
A. Yes, sir.
Q. And you saw also by the articles of copartnership of the African Pacific and Indian Hagey Co. the restrictions that were placed upon the partners, did you not?
A. Yes, sir, that they had all to consent in writing to the formula being revealed.
Q. Did you return any of the salary that you took out of this fund?
A. No.
Q. Did you ever offer to return any of it?
A. No. And I think I earned it, I was there for a month.
Q. You say you know something about the New South Wales transaction, is that true?
A. Yes, sir.
Q. Did you know that they bought a building in Auck-
230 land with the proceeds of the New South Wales sale?
A. No, I didn't know that.
Q. They didn't tell you?
A. No, the money for the building that was bought in Auckland was raised in another county, I think, as far as I know, so far as I know it was raised among New Zealand people.
Q. You have said that when you returned to—that you met Cowert, Kirkpatrick and Wolvington, I believe, at Sidney?
A. Yes, sir.
Q. You stated that they had heard of your dissatisfaction what did you mean by that?
A. They called on me and wanted to know what was the matter, they heard that I was in town and left Hobart and wanted to know what was wrong.
Q. You don't think that they said that they had heard of your dissatisfaction?
A. I think they said O'Brien had communicated with them about my leaving dissatisfied.
Q. Then you told O'Brien that you were dissatisfied?
A. Certainly I did.
Q. When did you tell him that?

A. When I was leaving, when I handed the business over to him.
Q. You didn't tell him that you were dissatisfied when you got there, had you?
A. No.
Q. Did you tell any of the Hagey people in Auckland that you were dissatisfied before you left?
A. They knew that I wanted to get out of the bargain if I could.
Q. Please answer the question?
A. They knew that I wanted to be relieved and that I didn't consider the business that I would like to get out of my contract.
231 Q. Did you tell any of the Hagey people in Auckland before you left that you were dissatisfied?
A. I don't know whether I told them in those particular terms or not. They knew that I didn't want to continue the contract if I could get out of it.
Q. They knew when you left that you were already dissatisfied?
A. They knew that I wanted to get the sheep back or the money and get out of the contract.
Q. Did they know that you were already dissatisfied?
A. I told them that I wanted to be relieved of the contract, they knew that.
Q. You didn't tell them that you were dissatisfied?
A. I don't remember.
Q. Did you not know at the tme that you left Auckland that Cowert and Kirkpatrick—I mean the first time you left Auckland for Sidney that Cowert and Kirkpatrick were unfriendly to Mr. Ables?
A. They told me that there had been some friction among them, but I didn't know the details of it, they seemed to be friendly enough, I knew there was some business friction.
Q. And yet you dealt with these two gentlemen, and you dealt with them principally?
A. I also saw Mr. Ables and he told me what they had done.
Q. Answer the question?
A. Yes, sir.
Q. At the same time you knew there was some friction between them?
A. I also went to Mr. Ables to find out if he was satisfied with what they had done and he seemed to be for that reason.
Q. Did you know why Mr. Moore didn't sign your contract?
A. He said it was enough for the others to sign.
232 Q. Said it was enough?
A. Yes, sir.
Q. And you as a lawyer thought so, did you not?
A. Well he refused to sign.
Q. Answer the question?

Objected to.
Objection sustained.

Mr. McClanahan:

Q. Did you see Moore refuse to sign?

A. He said it was enough when I asked him to sign, he said it was enough for the others to sign, he would not.

Q. You also said that he said it was enough for the others to sign?

A. Yes.

Q. You were entering into a contract with the partnership were you not?

A. Yes.

Q. Is it not a fact that you were in Hobart for a whole month and did not get a patient?

A. Yes.

Q. Is Hobart a temperance town?

A. Not particularly so that I know of.

Q. Did anybody want to be cured of drunkenness?

A. We heard of several people, we could not get them to come.

Q. Why not?

A. I have offered to give testimony on that score, you have objected to it.

Q. Well we will take it now. Why not?

A. Well we were told that O'Brien was keeping them back.

Q. Who is we?

A. Gilmore and I.

Q. Keeping who back?

A. The patients back.

Q. What patients?.

A. Several people we had heard of. We were told when we
233 went to their relatives to get them they said well some man told them, he cannot treat them, better that they wait until Kirkpatrick comes down. I went to O'Brien about that and said are you keeping these patients back until Kirkpatrick comes down? Well, he said, if Kirkpatrick comes we will be able to treat them better then, I said, don't you know that the funds are running out. And he said, you people can go out and I will have the whole thing for myself. I said, we want to get started, when is Kirkpatrick coming? And he said, he might come any day, but I had no information of Kirkpatrick coming there.

Q. Who was manager?

A. I was.

Q. You were the manager?

A. I could not——

Q. What did you do in the way of your duties?

A. I went to see these people, I said I want to have the patients come at once.

Q. Please name these people?

A. I don't remember their names, there were several patients, prospective patients that we had, and when they didn't come up O'Brien was sent after them first of all, and when O'Brien didn't bring them in, I went to see their friends who told me, at least in two or three cases, that O'Brien had advised them to wait until Kirkpatrick came, and I said we are ready to treat them and want them to come at once and they didn't come and I couldn't get them to come.

Q. Who are all these people that you are referring to?
A. The friends of patients that we were trying to get.
Q. You didn't go to the patients?
A. I didn't think I approached the patients personally, because O'Brien said if we would go to them and saying one thing
234 today and another tomorrow we would lose them probably altogether.
Q. The patients?
A. The negotiations were carried on chiefly with the funds of the patients, we tried to get them interested through the influence of their friends, we tried to get their friends to go to them to go and try and then after one of them had taken the treatment, the one that had taken the treatment would sympathize with the other patients.
Q. You and Gilmore for a month tried to get patients?
A. That was out business, we were very anxious to get patients.
Q. Did you do any independent work aside from O'Brien, in any way, getting patients?
A. Yes, I went to see several of the friends, I think I went to interview two friends of those who were prospective patients and they said they would not come just now, and I informed the friends of 8 or 10 others, but we were not able to get them. I went to the Mayor and Council of the town and asked for their sympathy and support which most of them promised, I went around to all the leading business people, I went around to all of the active temperance workers to get their assistance, for they approach all classes of people, wherever we thought we could get assistance from——
Q. What did the temperance people say?
A. They said they would help us in any way they could to give us information about people, prospective patients.
Q. What did you attribute the failure of the business in Hobart to?
A. Well, I don't think that when—well there was not funds enough to get it going properly and I don't think we could
235 possibly have got enough patients to make it a paying concern in any event.
Q. What do you attribute the failure to?
A. To the same reason that it has failed everywhere else, because the thing is no good.
Q. If it is no good, it wouldn't have made any difference how much money you had?
A. I don't think it could ever be made a paying proposition, I never heard of it that it has been, I never heard of anybody making money out of it excepting Cowert and Kirkpatrick, and they didn't do it by running the business.

Redirect examination of T. M. HARRISON.

Mr. ROBERTSON:

Q. Mr. Harrison, I understood you to say on cross-examination that after May of 1897 you owned the whole interest in the run, of the sheep?

A. '98, I think it was in May '98.
Q. Well at the time that you made this agreement?
A. Let me try—I made the agreement in October '98. It was the May before the date of the agreement.
Q. Well did you have the whole interest in the sheep about the time that you made this three cornered—signed this three cornered agreement with——
A. Only except——
Q. Wait until you hear the question. At the time that
236 you made this three cornered agreement on the 1st of October, '97, Ables, Robaison and yourself, did you own the whole of the sheep at that time?
A. No, I held some 500 sheep of Robaison's as security as a pledge for certain money that he owed me.
Q. Then you had not acquired the whole, the complete interest in the sheep at the previous May then, had you?
A. No. No. I——
Q. How much did you say you paid for the half interest in the run and the sheep?
A. I paid 650 also 38 Pounds, about 600—that would make 688 Pounds.
Q. And what was the value of the sheep that you added to the sheep that you put in?
A. I——

Mr. McCLANAHAN: Wait a minute. I object to the question as to the sheep.
The COURT: Objection sustained.

Mr. ROBERTSON:

Q. What did the sheep that you added to the run that you brought a half interest in cost you?

Objected to as immaterial and not cross examination.
Objection overruled. Exception.

Mr. ROBERTSON:

Q. What did those additional sheep cost you?
A. About 500 Pounds.
Q. And what did it cost you to buy out the balance—acquire the concern with Robaison's interest?

Objected to as not brought out on cross-examination.

The COURT:

Q. How much did Robaison's interest cost you?

237 Mr. ROBERTSON:

Q. What did it cost you to acquire the balance of Robaison's interest?

Objected to.
Objection overruled. Exception.

A. Altogether it cost about between 1700 and 1800 Pounds.

Mr. McClanahan: I object to that and ask that it be stricken out as irresponsive to the question.
Motion granted.

A. Let me see, 700 and 500, 1200—I suppose about between 500 and 600 Pounds.

Recross-examination of T. M. Harrison.

Mr. McClanahan:

Q. Did you pay cash for these sheep?
A. That is what I paid out in cash altogether, it was paid in cash at various times.
Q. Did you pay cash for these sheep that you added to the flock?
A. Yes, sir.
Q. Who did you buy them from?
A. I sent an agent to Robaison and bought——
Q. Who did you buy them from?
A. Robaison made the bargain.
Q. Who did you buy them from?
238 A. I think I bought them from Bieler.
Q. You don't know who he bought them from?
A. Yes, sir, he was to buy them from Birch, Bieler bought them from Birch and then we bought them from Bieler, and Bieler bought them from Birch.
Q. Didn't you take out a mortgage on the entire run when you turned these new sheep into the flock from Robaison?
A. No, they were never put in, the new sheep were never counted as partnership property, they were held as my own property when the final arrangement was made.
Q. Was not Robaison indebted to you, after you bought in he became indebted to you?
A. Yes.
Q. Why and how?

Objected to as not proper cross-examination.
Objection overruled. Exception.

A. Robaison had made me liable to pay certain debts that he had incurred in the name of the partnership, Robaison and Harrison partnership, and I undertook to pay these debts and did pay them and he assigned me the balance of his interest in the sheep.
Q. How were those debts incurred, what for?
A. Oh some of them had been run up, they were incurred in various ways.
Q. Debts incurred in connection with the sheep run were they not?
A. They were debts incurred in the name of Robaison and Harrison.

The COURT:

Q. Well, but for what purpose?

239 A. Well there were a lot of supplies brought out to the run and we paid men for services out of the partnership. Some of the service had been performed before I had been made a partner and there was some old store debts that had been incurred before I became a partner that he made me liable for as a partner, by signing for a lot of those things he made me liable for as a partner when he had no right to make me liable for as a partner, and when I found he had done this I said I will pay these things and you will have to assign me your sheep.

Q. They were all debts in connection with the run?

A. Yes, sir.

Q. What was this 38 pounds in connection with?

A. That was part of the original purchase price. I only paid 650 Pounds at first and I had not the balance to spare and I gave him my note for 38 Pounds.

Q. Gave to whom?

A. Gave to Robaison.

Q. Is not that the note that Ables assumed when he bought the sheep?

A. Yes, sir, that note was canceled.

Q. Answer the question please, did Mr. Ables assume that note when he bought the sheep?

A. No.

A JUROR:

Q. I understand Mr. Ables testified that when he signed the third contract he did not know that the words "or before" were in the contract, and you testify it was in there before the contract was signed; was it talked over with Mr. Ables?

A. Well I remember distinctly talking it over with Cowert and Kirkpatrick, and I remember when the time came for signing it the papers were lying there on the table and the Hagey partners were reading it over and they asked Mr. Robaison and I—Mr. Robaison told us that we had to leave the room while they discussed the matter. We went outside on the balcony for half an hour

240 and they called us in and the contracts were all signed. Most of them had left the room, and Robaison went out and got each of the men who had signed and brought them up to the contract and said, is that your signature, and they acknowledged their signatures to him, and then he signed as a witness.

Q. And is this copy before the court with the words "or before" a copy or original when that was signed?

A. That is one of them. There were four copies all signed, it was signed in quadruplicate.

Q. And the words "or before" were not there?

A. The words "or before" were in there, and it has been sued on in New Zealand, and Mr. Cowert had a copy as his, and they never raised this question, and they never asked Mr. Gilmore a question about the copy of the agreement that he had.

Mr. ROBERTSON: I understand that it is admitted on the part of the defendants that Mr. Magoon and Mr. Ables and Mr. McStocker as well as Mrs. Emerson, was served by Mr. Moot-Smith with a copy of this New Zealand summons on or about 23rd of July, 1898. Is that so Mr. McClanahan?

Mr. MCCLANAHAN: That is right.

Mr. ROBERTSON:

Q. What was the date that Mr. Gilmore left Auckland for Tasmania?

A. I think it was about the middle of November.

Q. Do you know the date?

A. I think it was about the 15th, I testified last time, I am not sure. It is in the transcript the last time, or he testified
241 to it, I am not sure.

Mr. ROBERTSON: Plaintiff rests your Honor.

Mr. MCCLANAHAN: If the Court please, we move for judgment of nonsuit on the following grounds: We move for a nonsuit as to the defendant Magoon on the ground that there has been shown no notice of dissatisfaction as required by the contract and no demand; on the ground that the contract is unauthorized; on the ground that there has been shown no ratification; on the ground that the evidence clearly shows that the dissatisfaction arose before the plaintiff entered into the conduct of the business and was therefore not *bona fide;* on the ground that there was no consideration for the contract sued on; on the ground that there was shown in the evidence a judgment in the New Zealand Court that remains unsatisfied and that it bars this action.

We make the same motion on the same grounds for the defendant Emerson.

We make the same motion on the same grounds for the defendant McStocker.

For the defendant Magoon we further move for a nonsuit on the following grounds viewing the contract as joint and several:

First. Because the contract is beyond the scope of the partnership business authorized;

Second. Because there has been no ratification shown within the rules of law as a ratification of an unauthorized contract;

Third. Even if ratification of some of the parties be shown, there is no ratification on the part of all and as a contract, could not be authorized by less than all, it cannot be ratified by less than all;

242 Fourth. On the ground that judgment has been had against some of the joint contractors that bars this suit against all or against the remaining ones;

Fifth. The contract was without consideration, the contract sued on;

Sixth. There is no signature of the firm to the contract sued on because all the members of the partnership did not sign.

Seventh. There is no proof of any *bona fide* dissatisfaction on the part of Harrison;

Eighth. There is no proof of any notice of any dissatisfaction to or demand on the defendant Magoon or the defendant McStocker or the defendant Emerson, or any of them;

We make the motion on the same grounds viewing the contract as joint for the defendant Emerson and the defendant McStocker. Viewing the contract as a several contract we move on behalf of defendant Magoon for a nonsuit on the ground that no authority is shown to bind Magoon, McStocker or Emerson or any of them:

Second. That no ratification has been shown by them or any of them;

Third. That no proof of any *bona fide* dissatisfaction on the part of Harrison has been shown;

Fourth. That there is no proof of notice to or demand on Magoon, McStocker or Emerson or any of them, and it is necessary to give notice and make demand on each.

Fifth. On the ground that no consideration passed to the several obligers.

243 We make the same motion on behalf of the defendant Emerson, on the same grounds and on behalf of the defendant McStocker on the same grounds.

We move for a nonsuit on behalf of defendant Ables:

First. On the ground that there is no contract by Ables without the others and no intent on either his part of Harrison's that he should be bound if the others were not;

Second. The form of the action is unsuited to the Plaintiff's claim since Ables cannot be bound severally on the contract;

Third. The contract was made by the Company and cannot bind Ables individually;

Fourth. If it be held that the contract can bind Ables individually it is a several contract, and there is no proof furnished of any notice of dissatisfaction to Ables and consequently no demand upon Ables.

Fifth. If assuming a contract to be held to be a joint one on the part of Ables and certain of the other defendants, the New Zealand — bars this action against Ables;

Sixth. There is no proof of any *bona fide* dissatisfaction on the part of Harrison;

Seventh: There is a misjoinder of parties defendant;

Eighth. There is no consideration passing to Ables;

Ninth: The New Zealand judgment bars this action against Ables.

The defendants' motion for a nonsuit, after due consideration by the Court, is granted as to all the defendants joining in the motion for a nonsuit, as to the defendants Magoon, McStocker, Emerson and Ables.

244 Mr. ROBERTSON: I note an exception if your Honor please.

The COURT: Gentlemen, at this stage of the case, the Court, having determined that the plaintiff cannot maintain this action as against the defendants, who have been served or who have appeared in this action, and who are now represented in Court, there is nothing in this case to be left to the determination of the jury. You are

therefore discharged with the thanks of this Court for your service in this cause.

Mr. ROBERTSON: We note an exception to the discharge of the jury.

The foregoing is a full true and correct transcript of my shorthand notes.

(Sg.) J. W. JONES,
Stenographer, Circuit Court, 1st Circuit.

Delivered this 25th day of July 1904.

245 In the Circuit Court of the First Circuit, Hawaiian Islands.

THOMAS MILNER HARRISON, Plaintiff,
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, and DOROTHEA EMERSON, Defendants.

Assumpsit.

To the above named Circuit Court of the First Circuit, Hawaiian Islands, Greeting:

I Frank Wilson Smith of Auckland New Zealand whose name and seal are hereunto subscribed being the Commissioner named in the Commission to take Testimony hereunto annexed do certify as follows:—

1. That I did on Friday the fourth day of May 1900 at my office in Auckland aforesaid being the day and place appointed by me for that purpose diligently examine Alfred Edward Gilmore of Auckland New Zealand upon the interrogatories hereunto annexed having first administered an oath to the said Alfred Edward Gilmore and did reduce the examination of the said Alfred Edward Gilmore to writing which said writing is hereunto annexed and is signed by the said Alfred Edward Gilmore.

In testimony whereof I have hereunto set my ha-d and seal at Auckland aforesaid the sixth day of July one thousand nine hundred.

(Sg.) F. WILSON SMITH, [SEAL.]
Commissioner.

246 *Interrogatories for Alfred Edward Gilmore, City of Auckland, Colony of New Zealand, Agent.*

1. Did you sign the Contract, a copy of which is produced marked "A"?
2. If so when?
3. How many copies were signed?
4. When did the other parties to the Contract sign?
5. Who is the witness to the contract?
6. Where is he?
7. From whose custody were the signed copies produced?
8. When did you go to Tasmania?

9. Did you go at your partner's, Mr. T. M. Harrison's request?
10. Where did you locate in Tasmania?
11. What did you do in the Hagey business before the other persons to assist you arrived?
12. When did Mr. O'Brien arrive?
13. When did Mr. Harrison arrive?
14. Was the intended opening of the Hagey Gold Cure business well known in Hobart before O'Brien and Harrison arrived?
15. Did you know of any prospective patients at this time?
16. Did you hear of any more prospective patients between this time and the time of your departure from Tasmania?
17. What did you do concerning the opening of the Hagey business after Harrison's arrival?
18. What did Harrison do after he arrived?
19. What was O'Brien expected to do, and what did he do?
20. What was done in order to obtain premises?
21. What was done to advertise the business?
22. When were the premises engaged and when were they
247 ready to receive patients?
23. Was there anything in the condition of the premises or in the repairs being made to them that would render them untenable for treatment of patients?
24. If so what were those things?
25. During what time did they exist?
26. How long would it have taken to remedy them if patients had come for treatment?
27. Was it necessary for men working on the balcony and verandah to enter the house?
28. Did workmen create an annoyance by making noise?
29. If so when and for how long?
30. Did men painting the verandah and balcony in any way disturb the people in the house?
31. Were the premises suitable to receive patients during the time you, O'Brien and Harrison were in Hobart?
32. Do you know if O'Brien was keeping patients from coming to premises for treatment?
33. If so when did you learn this?
34. What reasons had you for so believing?
35. Did you mention the matter to Harrison?
36. If so when?
37. What did you tell him?
38. Did you become dissatisfied with the condition of the business?
39. If so why?
40. When did you leave Hobart and Tasmania?
41. What was the financial condition of the business when you left?
42. In this statement marked "B" so far as you remember a true statement of receipts and expenditures up to the dates mentioned in it?
43. Whom did you leave in charge of the business?

248 44. With the funds on hand could Mr. Harrison have continued the business for more than a few days after you left?
45. How were the funds for starting the business raised?
46. Were the other partners and yourself willing to advance more funds for continuing the business?
47. Did you hear any of the o-her partners express their intentions in regard to this matter?
48. If so whom?
49. What did they say?
50. Was there a better opportunity of obtaining patients after you left than there was before?
51. If so why?
52. What settlement did you make with the defendants in this action concerning your interest in the Tasmania business?
53. What efforts did you make to recover from these defendants the Two Hundred and Fifty (250) pounds invested by you in this business?
54. How far have your efforts been successful?
55. Did Mr. Harrison wish to start the business in Tasmania?
56. Did he make proper efforts to start it there?
57. Was Mr. Harrison dissatisfied with the condition of the partnership busines in Tasmania when you left there?
58. Did he have cause for being dissatisfied?
59. If so, what cause or causes?

249 In the Circuit Court of the First Circuit, Hawaiian Islands.

THOMAS MILNER HARRISON, Plaintiff,
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES and DOROTHEA EMERSON, Defendants.

Assumpsit.

Examination upon oath of Alfred Edward Gilmore, City of Auckland, Colony of New Zealand, Agent, upon the interrogatories and cross-interrogatories hereto annexed, made by Frank Wilson Smith, on Friday, the fourth day of May, 1900, in his office, in the said City of Auckland, being the day and place appointed by him.

Answer to Interrogatory Number	1. Yes.
Ditto	2. On the 1st October 1897.
Ditto	3. Three I believe
Ditto	4. I can't be positive
Ditto	5. W. C. Robison
Ditto	6. Cannot say
Ditto	7. Cannot say
Ditto	8. Think on 15th November 1897
Ditto	9. Yes
Ditto	10. Hobart

Ditto 11. Put an advertisement in the Hobart paper. That is all I did

Ditto 12. Say about six weeks after I did.

Ditto 13. A few days later than O'Brien

Ditto 14. The intended opening could only be known through the advertisement in the papers.

250

Answer to Interrogatory Number 15. No, not at the time O'Brien & Harrison arrived.

Ditto 16. Yes.

Ditto 17. Took premises. Advertised and canvassed.

Ditto 18. Acted as manager

Ditto 19. O'Brien was supposed to canvas- and I suppose he did

Ditto 20. We looked for a likely place

Ditto 21. Advertised in paper and distributed handbills.

Ditto 22. Cannot say

Ditto 23. No, but it might render it a little inconvenient for the treatment of patients

Ditto 24. Workmen being about.

Ditto 25. About a week

Ditto 26. It would not be impossible to treat patients at any time. It might have been inconvenient but was quite practicable

Ditto 27. Cannot say.

Ditto 28. Yes, a slight one

Ditto 29. During the alterations

Ditto 30. Not as much as painters would ordinarily disturb the people in the house.

Ditto 31. Yes

Ditto 32. I do not know, but had a suspicion

251 Ditto 33. ——.

Ditto 34. Because he never brought any patients

Ditto 35. Yes.

Ditto 36. On several occasions.

Ditto 37. That I was dissatisfied with O'Brien's canvassing.

Ditto	38. Yes.
Ditto	39. Because there appeared no prospect of doing business and we could not get any patients.
Ditto	40. About the end of March, 1898.
Ditto	41. Bad.
Ditto	42. As nearly as I can remember.
Ditto	43. O'Brien.
Ditto	44. No
Ditto	45. On terms of our agreement.
Ditto	46. No.
Ditto	47. I believe I did
Ditto	48. Cowart or Kirkpatrick.
Ditto	49. The gist of what they said was that they did not care to advance any more money.
Ditto	50. I cannot say
Ditto	51. ——.
Ditto	52. I got two Promissory Notes from Cowart for the amount I had invested (£250) but they were dishonored.
Ditto	53. I sued in Scotland on the Promissory Notes.
Ditto	54. I recovered the amount without costs.
Ditto	55. Yes.
Ditto	56. Yes, I suppose so, he did his best.
Ditto	57. Yes.
Ditto	58. Yes.
Ditto	59. I presume for the same reasons as I was dissatisfied myself as mentioned in my answer to interrogatory No. 39.

(Sg.) A. E. GILMORE.

(Sg.) F. WILSON SMITH.

252 [N. Z. Stamp 11 1/10/97 T. M. H.]

"A."

Memorandum of Agreement.

Memorandum of Agreement made this 20th day of September, 1897, between the African Pacific and Indian Hagey Company, an association of partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, the said partnership being composed of the following members:—T. E. Cowert, J. H. Kirkpatrick, and Geo. D. Moore, of the State of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore, and Thomas Milner Harrison, both of the City of Auckland in the Colony of New Zealand, parties of the second part.

Whereas the said Company have the exclusive right and title to the Hagey formulas for Alcoholism and Narcotism in and for the Colony of Tasmania and whereas the said Company have by contract entered the — day of May 1897 with James Wolfenden secured certain rights relative to the use of the Thompson formulas for said diseases and whereas the said parties hereto propose to enter into partnership for the purpose of using, administering and vending to others the right to use and administer the said remedies in the Colony of Tasmania and in no other place or places.

Now These Presents Witnesseth:

For and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated.

1. That the capital of the said partnership shall be (£5000) five thousand pounds, of which the said Company shall own
253 (11/20) eleven-twentieths, in consideration of granting all their exclusive rights to use the said remedies in the said Colony to the said partnership hereby formed; and the said Company will supply the said partnership hereby formed with the said remedies at the cost price thereof, until such time as the formulas for the preparation of the same may be given the said partnership hereby formed; and the said Company will not use the said remedies in the said Colony during the existence of the said partnership hereby *g*formed otherwise than as partners therein; and they thereby convey to the said partnership hereby formed all their rights, privileges and recourses against others than the said partnership using the said remedy in the said Colony.

2. That the said Gilmore and the said Harrison have paid the sum of (£2250) two thousand two hundred and fifty pounds to the said Company for the other (9/20) nine-twentieths interest in the said partnership hereby formed, the receipt whereof is hereby acknowledged.

3. That the said Gilmore and the said Harrison shall conduct the business of the said partnership in Tasmania each at a salary of

(£40) forty pounds per month to be a first charge on the receipts of the business after the current expenses have been paid. The said Harrison to act as manager of the said partnership hereby formed and the said Gilmore to act as Secretary Treasurer thereof.

4. That if at or before the expiration of a period of six months from the date of the departure of the said Gilmore or the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (£2250) said two thousand two hundred and fifty pounds mentioned in Clause (2) two hereof in some
254 other district of the Company's field of operation in exchange for the portion of the said (£2250) two thousand two hundred and fifty pounds taken by him, and the said Company reserve- the right either at the suggestion of the partners in Tasmania, or at their own suggestion to send one of their own number or some competent man to aid and assist the partners in Tasmania at the same salary and with the same powers as either the said Harrison or the said Gilmore.

5. That the respective interests of the said Harrison and the said Gilmore in the partnership business in Tasmania are as follows, the said Harrison to have a (2/5) two-fifths interest for which he has paid (£2000) two thousand pounds as mentioned in Clause (2) two hereof and referred to in Clause (4) four hereof, and the said Gilmore a (1/20) one-twentieth interest in the said partnership for which he has paid (£250) two hundred and fifty pounds as referred to in Clauses (2) two and (4) four hereof.

6. That a fund necessary for the starting of the business in Tasmania shall be raised by the partnership hereby formed, and placed in the hands of the said Gilmore and the said Harrison.

7. That the said Company reserves the right to dispose of a (1/20) one-twentieth interest in the partnership hereby formed, for the sum of (£250) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

In Witness Whereof the said parties hereto have set their hands this 1st day of October 1897.

(Sig.) T. E. COWART.
J. H. KIRKPATRICK.
J. A. MAGOON,
By His Att'ys, J. H. KIRKPATRICK,
T. E. COWERT.
DOROTHEA LAMB,
By Her Att'ys, J. H. KIRKPATRICK,
T. E. COWERT.
A. E. POWTER,
By His Att'y, T. E. COWERT.
LEMUEL C. ABLES.
FRANK B. McSTOCKER,
Per His Att'y, L. C. ABLES.
J. WOLFENDEN.
T. M. HARRISON.
A. E. GILMORE.

Signed in the presence of

255 B.

Statement of Funds of Hagey Company, Tasmania, Received and Disbursed to Feb. 11, 1898.

Receipts.

Oct. 12.	From Hagey Co. Auckland	110″	0″	0″
"	T. M. Harrison	80″	0″	0″
		190″	0″	0″

Disbursements.

Oct. 12.	Medicines	24″	0″	0″
	Exchange		8″	7″
18.	Freight on Med.	30″	10″	0″
Nov. 9.	A. E. Gilmore	30″	0″	0″
Jan. 10.	J. D. O'Brien	20″	0″	0″
" 24.	J. D. O'Brien, passage	6″	5″	0″
Feb. 3.	Hyp. Syringe		15″	0″
" 4.	Adv. Tasmanian News	2″	0″	0″
" 5.	Adv. Mercury	7″	0″	0″
" 5.	J. D. O'Brien	10″	0″	0″
" 7.	Moir Hyp. Syringe	1″	15″	0″
" 7.	Gilmore, Med. & Adv.	1″	15″	0″
" 9.	Rent	7″	0″	0″
" 11.	Gilmore, duty Med.	3″	0″	1″
" 11.	Stationery		5″	11″
" 11.	T. M. Harrison	40″	0″	0″
" 11.	Balance on hand	34″	16″	0″
		190″	0″	0″

256 PLAINTIFF'S EXHIBIT "A."

(Endorsed.)

Filed 29th October, 1903. M. T. Simonton, Clerk.

This agreement made between T. E. Cowart, J. H. Kirkpatrick and Geo. D. Moore of San Antonio, Texas, and A. E. Powter, of Montreal, Canada, and J. A. Magoon, F. B. McStocker, L. C. Ables, and Dorothea Lamb, of Honolulu, Island of Oahu: Witnesseth,

That the said parties agree and do hereby associate themselves together as partners in the business of administering the formulas known as the Hagey Gold Cure, and in the establishment and disposition of Institutes for the purpose of administering said formulas.

The territory through which the operations of this Company will extend are the Islands of the Pacific and Indian Oceans, and the

Continent of Africa, exclusive of the Hawaiian Islands; the right to the same having been acquired by transfers from F. A. & W. C. Sutphen, of Aurora, Illinois, copies of the bills of sales of which are hereto attached and made a part hereof, and which rights are hereby transferred to and vested in this Company.

The capital stock of this co-partnership shall consist of One Hundred and five thousand (105,000) dollars to be owned in the following proportions: T. E. Cowart 31740 dollars, J. H. Kirkpatrick 31740 dollars, A. E. Powter 11458 dollars, Geo. D. Moore 2062 dollars, J. A. Magoon 12500 dollars, F. B. McStocker 5000 dollars, L. C. Ables 8000 dollars, Dorothea Lamb 2500 dollars.

The term of this co-partnership shall begin this day and continue for a period of five years.

That T. E. Cowart, J. H. Kirkpatrick and L. C. Ables shall at all times during the continuance of this partnership give their attendance and to the best of their skill and power exert themselves for the joint interest, profit and benefit of the partnership, and for such services they shall receive a salary of two hundred (200) dollars per month for each and every month as long as the said business is profitable, to be paid out of the proceeds of the business after the running expenses have been deducted. It is understood
257 and agreed that there shall be no personal liability of any of the partners for the payment of these salaries.

That all net profits shall be divided between the partners in proportion to the amount of capital stock of each and that said co-partners shall bear and sustain all expenses and losses in accordance with the proportional share that each may hold.

That at all times during the continuance of this partnership there shall be kept full and correct books of account wherein each of the said partners shall enter all money received, paid out, or expended in and about the said business, and all other matters and things whatsoever to the said business or management thereof in anywise belonging, which said books shall be open to the inspection of all the other co-partners, and the said partners once in each and every month, or oftener if necessary, shall make and render each to the others a full and correct inventory and account of all profits or increase by them or any of them made, and the losses by them or any of them sustained, and also all payments, receipts, disbursements, or other things by them made, received, disbursed, acted or done, or suffered in the said partnership and business and upon the rendering of such account shall clear, adjust, make and deliver each to the others their just share of the profits in the manner aforesaid.

That the said partners mutually agree to and with each other that during the continuance of the said partnership, none of them will give or endorse any note, or create any liability in behalf of the Company.

It is hereby expressly agreed and understood by the parties to this agreement that a fund necessary for the establishment and maintenance of the Institutes in the territory before referred to, shall be placed in the hands of the said T. E. Cowart, J. H. Kirkpatrick, and

L. C. Ables, and that the members of this Company are not bound for any debts and obligations incurred otherwise.

258 And at the end of their partnership the said partners will make each to the other full and correct account of all things relating to their business and in all things truly adjust the same, and all and every stock and stocks as well as the gains and increases hereof, which shall appear to be remaining, either in money, goods, wares, fixtures, debts, or otherwise, shall be divided between them in the aforesaid proportions.

The officers of the said company shall consist of the manager, secretary, treasurer, and auditor, who shall be selected by the members of the company, and T. E. Cowart has been selected to fill the position of manager, L. C. Ables secretary and treasurer, and J. H. Kirkpatrick, auditor, and they shall hold office subject to the will of the Company until such time as their successors are selected.

The name of the Company shall be "The African, Pacific and Indian Hagey Company."

The interest of the partners is to be pooled, that is, no one partner can dispose of his interest or any part thereof without the consent of all the other partners thereto obtained in writing.

It is hereby expressly understood and agreed that no partner shall under any circumstances whatever reveal the ingredients of the said formulas or any part thereof to any person or persons under any conditions or circumstances whatsoever unless with the consent in writing of all the other partners first obtained.

In witness whereof, we have hereunto set our hands this 10th day of April, A. D. 1897.

(Sgn.)	LEMUEL C. ABLES.
(Sgn.)	ALFRED MAGOON.
(Sgn.)	DOROTHEA LAMB.
(Sgn.)	F. B. McSTOCKER.
(Sgn.)	J. H. KIRKPATRICK.
(Sgn.)	T. E. COWART.

259 PLAINTIFF'S EXHIBIT "B."

(Indorsed.)

Filed October 29th, 1903. M. T. Simonton, Clerk.

Know all men by these presents, that I, F. B. McStocker, of Honolulu, Island of Oahu, Hawaiian Islands, do hereby make, constitute and appoint L. C. Ables, my true and lawful attorney in my name, place and stead, to act for me in all matters connected with the African, Pacific and Indian Hagey Company, and for that purpose to establish Institutes and to sell the medicines compounded under the formulas belonging to the Company; to sell and dispose of the said formulas in the districts where he may be operating; and to do and perform all other acts and things that may be necessary and proper in the prosecuting of the business of the said Company.

Giving and granting to my said attorney full power and legal authority to do all things in the said premises as fully to all intents and purposes as I might or could do if personally present.

Hereby ratifying and confirming all my said attorney shall do or cause to be done by virtue of these presents.

In Witness Whereof, I have hereunto set my hand this 10th day of April, A. D. 1897.

——— ———.

This day personally appeared before me F. B. McStocker, to me well known, who did solemnly and sincerely declare and state that he had signed the foregoing document freely and voluntarily and for the uses and purposes therein set forth. In witness whereof I hereunto affix my signature and seal of office at the British Vice-Consulate, Honolulu, this 10th day of April, 1897.

(Sig.) THOMAS RAIN WALKER,
[SEAL.] *British Vice-Consul.*

260 PLAINTIFF'S EXHIBIT "C."

(Indorsed.)

Filed October 29th, 1903. M. T. Simonton, Clerk.

[N. Z. Stamp 11 1/10/97 T. M. H.]

Memorandum of Agreement.

Memorandum of Agreement, made this 20th day of September, 1897, between The African Pacific and Indian Hagey Company, an association, of partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, the said partnership being composed of the following members: T. E. Cowert, J. H. Kirkpatrick and Geo. D. Moore, of the State of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore, and Thomas Milner Harrison both of the city of Auckland, in the Colony of New Zealand, parties of the second part.

Whereas the said Company have the exclusive right and title to the Hagey formulas for Alcoholism and Narcotism in and for the Colony of Tasmania and whereas the said Company have by contract entered the — day of May 1897 with James Wolfenden secured certain rights relative to the use of the Thompson formulas for said diseases and whereas the said parties hereto propose to enter into partnership for the purpose of using, administering and vending to others the right to use and administer the said remedies in the Colony of Tasmania and in no other place or places.

Now these presents witnesseth:

For and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated.

1. That the capital of the said partnership shall be (£5000) five thousand pounds, of which the said Company shall own
261 (11/20) eleven twentieths in consideration of granting all their exclusive rights to use the said remedies in the said Colony to the said partnership hereby formed: and the said Company will supply the said partnership hereby formed with the said remedies at the cost price thereof, until such time as the formulas for the preparation of the same may be given the said partnership hereby formed; the said Company will not use the said remedies in the said Colony during the existence of the said partnership hereby formed otherwise than as partners herein; and they hereby convey to the said partnership hereby formed all their rights, privileges and recourses against others than the said partnership using the said remedy in the said Colony.

2. That the said Gilmore and the said Harrison have paid the sum of (£2250) two thousand two hundred and fifty pounds to the said company for the other (9/20) nine twentieths interest in the said partnership hereby formed, the receipt whereof is hereby acknowledged.

3. That the said Gilmore and the said Harrison shall conduct the business of the said Partnership in Tasmania each at a salary of (£40) forty pounds per month to be a first charge on the receipts of the business after the current expenses have been paid. The said Harrison to act as manager of the said partnership hereby formed and the said Gilmore to act as Secretary Treasurer thereof.

4. That if at or before the expiration of a period of six months from the date of the departure of the said Gilmore or the said Harrison from New Zealand to Tasmania, the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (£2250) said two thousand two hundred and fifty pounds mentioned in Clause (2) two hereof in some other district of the Company's field of operation in exchange for the portion of the said (£2250) two thousanad two hundred and fifty pounds taken by him and the said Company reserve the right either at the
262 suggestion of the partners in Tasmania or at their suggestion to send one of their own number or some competent man to aid and assist the partners in Tasmania at the same salary and with the same powers as either the said Harrison or the said Gilmore.

5. That the respective interests of the said Harrison and the said Gilmore in the partnership business in Tasmania are as follows, the said Harrison to have a (2/5) t-o fifths interest for which he has paid (£2000) two thousand pounds as mentioned in Clause (2) two hereof and referred to in Clause (4) four hereof, and the said Gilmore a (1/20) one twentieth interest in the said partnership for

which he has paid (£250) two hundred and fifty pounds as referred to in Clauses (2) and (4) hereof.

6. That a fund necessary for the starting of the business in Tasmania shall be raised by the partnership hereby formed, and placed in the hands of the said Gilmore and the said Harrison.

7. That the said Company reserves the right to dispose of a (1/20) one twentieth interest in the partnership hereby formed, for the sum of (£250) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

In Witness Whereof the said parties hereto have set their hands this 1st day of October 1897.

(Sig.) T. E. COWART.
J. H. KIRKPATRICK.
J. A. MAGOON,
By His Att'ys, J. H. KIRKPATRICK,
T. E. COWART.
DOROTHEA LAMB,
By Her Att'ys, J. H. KIRKPATRICK,
T. E. COWART.
A. E. POWTER,
By His Att'y, T. E. COWART.
LEMUEL C. ABLES.
FRANK B. McSTOCKER,
Per His Att'y, L. C. ABLES.
J. WOLFENDEN.
T. M. HARRISON.
A. E. GILMORE.

263 PLAINTIFF'S EXHIBIT "D."

(Indorsed.)

Filed October 29th, 1903. M. T. Simonton, Clerk.

AUCKLAND, N. Z., *Oct.* 2, 1897.

DEAR MAC: At the last moment Col. Moore has decided to go to Honolulu and Texas. He will put things to you as they are.

In Haste,
(Sg.) L. C. ABLES.

Memorandum.

AUCKLAND, N. Z., *Sept.* 30, 1897.

a/c due and not collected £407–12–0.

Since Aug. 31 Expense a/c has been charged with salaries of Cowart, Kirkpatrick, Wolfenden & Ables and these parties credited with salaries due them to Sept. 30.

Daniels' salary. I have not yet credited up to him the £84-0-0 is what he has drawn on a/c. The £250-0-0 is payment received on

a/c of sale of Tasmania. £100-0-0, of this is to be put into the funds towards defraying expenses of parties going there. The sale of Tasmania was for 9/20 of the Territory we get this amount of money and about 6000 sheep which are about 270 miles from Auckland and of uncertain value.

Outstanding a/c's owed by us about £50.

E. & O. E.

(Sg.) L. C. ABLES, *Treasurer.*

Sept. 30, 1897.

264 PLAINTIFF'S EXHIBIT "E."

(Indorsed.)

Filed October 29th, 1903. M. T. Simonton, Clerk.

AUCKLAND, N. Z., *Oct.* 29, 1897.

DEAR MAC: Yours of Sept. 22 to hand and contents all carefully noted. Regarding affairs here, I am not going to try and enter into details tonight, I have been in bed all day and it is now eleven o'clock and I have just closed the show for the night. Regarding the matter of $22000 you speak of, we did try that plan and I have tried dozens of other schemes and plans to get out. But in all of them have never lost sight of the fact that your interest must be looked after with as much if not more care than my own. I can't help thinking that it is very fortunate for you, Magoon and others that I have been here. I am perfectly satisfied however, that in trying to do what I considered square and for the best interests of all, I have got myself badly disliked with the parties here, and I feel confident the same has not been appreciated by you at home and particularly do I feel that this is so in the case of Magoon. Of course, I don't know what they write from this end neither do I know what Magoon writes. T. E. C. has given me the information that he J. A. M. took no stock in me and wanted me put out as Treasurer. I took this with a reasonable amount of salt. Regarding the deals made, they are rather to- complicated for me to explain. I will admit that I don't understand them well enough myself to explain them to any one. So I will leave that to C. & K. to give to J. A. M. I believe that Magoon & Miss Lamb will be considered more carefully than you & I. Cowart tells me that he is submitting a plan to buy them out. I, of course, don't know what the plan is. I have thought Mac many times, that you might come out better were you to let them handle your interest. If you should think so, do not consider my feelings in the matter. There is no denying the fact, that I am the one who is in the way and that I am the one they want to down if possible. I have tried hard to get my territory by myself and to give you the chance
265 to leave yours stand where it now is or go to with me. But they won't have it. I send you a copy of journal entries made today which explain themselves. I will send trial balance for Oct. first mail. When we went in with Dr. Wolfenden the arrange-

ment was that the money brought here from Honolulu was to be refunded before any dividends were paid. Your proportion of this would be..... £24 — 7 — 5
18% Dividend declared this day would be..... £162 — 0 — 0

Total..... £186 — 7 — 5

I will send you that amount less exchange. With nothing further, I am

Yours Faithfully,

(Sg.) LEM. C. ABLES.

Stock a/c ..... £512 — 2 — 10

To Sundries:

T. E. Cowart	154 — 14 — 4
J. H. Kirkpatrick	154 — 14 — 4
A. E. Powter	56 — 1 — 4
J. A. Magoon	61 — 0 — 4
F. B. McStocker	24 — 7 — 5
L. C. Ables	39 — 2 — 4
Dorothea Lamb	12 — 1 — 6
Geo. D. Moore	10 — 1 — 3

Entry made to repay money brought from Honolulu:

Dividend £3780

To Sundries:

T. E. Cowart	£1028 — 7 — 6
J. H. Kirkpatrick	1028 — 7 — 6
A. E. Powter	371 — 4 — 4
J. A. Magoon	405 — 0 — 0
Dora. Lamb	81 — 0 — 0
J. Wolfenden	378 — 0 — 0
L. C. Ables	259 — 4 — 0
F. B. McStocker	162 — 0 — 0
Geo. D. Moore	66 — 16 — 8

18% Dividend declared this day.

266 PLAINTIFF'S EXHIBIT "F."

(Indorsed.)

Filed October 29th, 1903. M. T. Simonton, Clerk.

Trial Balance Nov. 30, 1897.

C. B. Cash	5 — 17 — 7		
1. Stock %	21000 " "		
3. T. E. Cowart Stock %		5713 — 4 — "	
4. J. H. Kirkpatrick "		5713 — 4 — "	
5. A. E. Powter "		2062 — 6 — "	
6. George D. Moore "		371 — 6 — "	
7. J. Alfred Magoon "		2250 — " — "	
8. Lemuel C. Ables "		1440 — " — "	
9. F. B. McStocker "		900 — " — "	
10. Dora. Lamb "		450 — " — "	
11. J. Wolfenden "		2100 — " — "	
13. T. E. Cowart Private %		120 — " — "	
14. J. H. Kirkpatrick " "		120 — " — "	
16. J. Wolfenden " "		40 — " — "	
17. Lemuel C. Ables " "		63 — " — "	
25. Expense	2493 — 13 — 11		
32. Alcoholism		1251 — 0 — 6	
40. Morphine		84 — " — "	
43. Nervousness		14 — 10 — "	
44. Territory		5045 — " — "	
51. Dividend %	3780 — " — "		
53. A. W. Currie	26 — 5 — "		
" H. J. Ellis	26 — 5 — "		
" G. F. Hill	11 — 5 — "		
54. David T. Fox	21 — 5 — "		
" Robt. Reu	16 — 5 — "		
" Sir Morris O'Rake	15 — " — "		
55. Mis. Oldham	1 — 5 — "		
" George H. Campbell	11 — 5 — "		
" R. J. Bromley	29 — 5 — 0		
56. Mathew O'Brien	19 — 5 — 6		
Amts. Bro't for'd	27456 — 17 — "	27737 — 10 — 6	
56. R. A. Case	29 — 5 — 0		
" Hugh L. Kirkwood	21 — 12 — "		
57. Alex. McMurtie	13 — 19 — "		
" D. Bews	26 — 5 — "		
" Harry Meyers	21 — 5 — "		
58. Frank McKenna	26 — 5 — "		
" Frank H. Chapman	16 — 5 — "		
59. John McCafferty	26 — 5 — "		
" Joe. Memns	8 — 17 — "		

" Mis. D. Archer	16 — 5 — "	
60. Wm. T. Reardon	29 — 5 — "	
" Joseph Gilmore	21 — 5 — "	
61. Henri Le. Houx.....	21 — 5 — "	
" Geo. F. Porter.....		4 — 5 — 0
62. Ed. McKeon	1 — " — "	
" Thos. Solon	1 — " — "	
63. Dan. Conway	26 — 5 — "	
" Wm. Joughen		5 — " — "
64. House %	5 — " — "	
69. Robt. Burns		5 — " — "
" Fred Gordon		10 — 12 — 6
" Patrick Walsh		10 — " — "
71. D. Dukes	— 18 — "	
72. J. P. T. Cauldfield.....	3 — 10 — "	
	27772 — 8 — "	27772 — 8 — "

267 PLAINTIFF'S EXHIBIT "H."

(Indorsed.)

Filed October 29th, 1903. M. T. Simonton, Clerk.

Memorandum of Agreement.

These articles of agreement entered into between the African Pacific & Indian Hagey Company, an association or partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, said co-partnership composed of the following members, to-wit:

T. E. Cowart, J. H. Kirkpatrick, and Geo. D. Moore, of the State of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables, and Dorothea Lamb of Honolulu, Republic of Hawaii, all parties of the first part, and J. Wolfenden, of Victoria, Australia, (formerly of Chicago, Illinois), party of the second part. Witnesseth:

For and in consideration of the convenants and agreement hereinafter named, by the party of the second part, the parties of the first part acting for themselves individually and for the partnership collectively do hereby constitute and accept said J. Wolfenden a partner in the before mentioned Company, and entitled to all the privileges, and bound by all the conditions, limitations and restrictions as set forth in the original articles of co-partnership being attached hereto and made a part hereof. Dr. Wolfenden's interest in the business does not include the continent of Africa, it being hereby reserved.

The said J. Wolfenden's interest in the partnership consists of a ten thousand five hundred (10,500) dollar interest in a capital stock of one hundred and five thousand (105,000) dollars. Said interest is hereby vested in and assigned to said J. Wolfenden in the same manner as the various interests are held by other members of the Company.

In consideration of the foregoing covenants and agreements upon the part of the parties of the first part, the party of the second part does hereby transfer, and assign to the new partnership of which he is a member, all rights, franchises, or contract rights he may have secured, or which in the future he may secure from Dr. — Thompson, of Chicago, Illinois, United States of America, to use, control, or in any wise dispose of the remedies for alcoholism and narcotism, said remedies being the original discovery of the said Dr. — Thompson, the foregoing stipulations apply to the following territory, to-wit: Australia and all other islands of the Pacific and Indian Oceans, and none other.

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And the said Wolfenden hereby binds himself, his heirs or assigns to refrain from using or permitting others to use, or in any wise dispose of any rights, franchises, or of administering or permitting others to administer any of Dr. Thompson's remedies for alcoholism and narcotism in any of the before mentioned territory.

It is further provided that the said J. Wolfenden, or his representative, is hereby given power and authority to use Dr. Thompson's remedies in the Institute already established in Victoria, Australia, until such time as the co-partnership may determine to be for their best interest.

Said party of the second part agrees to give his entire time to the business of the co-partnership in the capacity of lecturer, and general traveling representative for the company. For such services the said J. Wolfenden shall receive the sum of two hundred (200) dollars, or (forty pounds) per month; to be paid in the same manner as the salaries of the other officers of the Company provided for in the original articles of co-partnership.

Said J. Wolfenden shall have full authority to carry on his ministerial work but in such a manner as will not conflict with his duties toward the before mentioned Company. Each Sunday and two evenings per week being entirely at his own disposal.

That the plan of establishing and operating the business shall be to establish in Auckland, New Zealand, and in such other cities as may be deemed for the best interest of the Company, Institutes, or places of treatment, where Dr. W. H. H. Hagey's remedies will be administered for alcholism and narcotism under the directions of a licensed physician. Every means will be exerted to elevate the moral nature of the patient during the time he is under treatment.

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As soon as the proposed Institute is established in Auckland, New Zealand, and in a good condition, a branch Institute shall be established as soon as practicable in some suitable location in the Country for the reception of patients who prefer to attend such an Institute. A physician will be employed to administer the treatment, a superintendent shall have charge of the Institute, and such other arrangements shall be made for the promotion of the best interests of the Company.

It is also stipulated that Miss Agnes W. Jamieson of Victoria, Australia, shall be tendered a position as an employee of the Company on a salary of twelve pounds per month, with board. Her term of service to begin upon her return, from a proposed visit to

Victoria, Australia, to Auckland, New Zealand, and to continue as long as she may be able to discharge her duties, and the said Dr. Wolfenden remains with the co-partnership before referred to. Miss Jamieson's reasonable traveling expenses when on business for the company, shall be paid by the said company.

Said J. Wolfenden shall not be called upon to contribute any money towards the establishment of the Institute in Auckland, New Zealand, a fund already having been provided by the original co-partnership for that purpose, nor shall he be accounted for to the parties having supplied the same.

It is further agreed that when the co-partnership shall deem it to their interest to take charge of the Institute now running in Victoria, Australia, under the management of the said J. Wolfenden (and which Institute nothwithstanding anything herein contained, J. Wolfenden is authorized to run at his own cost and expense, and for his own benefit for one year), they may purchase the same and the good will and furniture therein at a valuation, paying to the said J. Wolfenden nine-tenths (9/10) of the purchase money, upon the payment of which, the said Institute, good will and fur-
270 niture shall be the property of the partnership but should the partnership not purchase the same at the expiry of such year the said J. Wolfenden may sell the same to any other person on the express condition that the Hagey remedies be exclusively used therein in which case the said J. Wolfenden shall retain for his own use nine tenths in of the purchase money paying one tenth to the other members of the partnership. During the time subsequent to the expiry of such year in which the said Institute may remain unsold the said J. Wolfenden may continue to run the same using the Hagey remedies exclusively unless otherwise agreed by the partnership he retaining nine-tenths of the profits and paying the other members of the partnership.

It is further agreed that in the event of the dissolution of this partnership, and their retirement from business, said J. Wolfenden is hereby given full power to carry on Institutes for the treatment of inebriates along the lines operated on by him before the formation of this present partnership, using Dr. — Thompson's remedies.

The status of the said J. Wolfenden in the said partnership so formed is that of one of the managing partners of the Company, co-ordinating with the other officers of the Company provided for in the original articles of co-parnership.

(Sgn.) T. E. COWART.
(Sgn.) J. H. KIRKPATRICK.
(Sgn.) A. E. POWTER,
By His Att'y, T. E. COWART.
J. A. MAGOON,
By His Att'ys, J. H. KIRKPATRICK & T. E. COWART.
(Sgn.) J. H. KIRKPATRICK.
(Sgn.) T. E. COWART.
(Sgn.) LEMUEL C. ABLES.
(Sgn.) FRANK B. McSTOCKER,
By His Attorney in Fact L. C. ABLES.

271 PLAINTIFF'S EXHIBIT "I."

(Indorsed.)

Filed October 29th, 1903. M. T. Simonton, Clerk.

AUCKLAND, N. Z., *Oct.* 12, 1897.

Thomas Milner Harrison, Sydney.

DEAR SIR: I enclose you herewith exchange on Bank of New Zealand for £86 less exchange leaving £85 — 11 — 5. This is the amount of our assessment of £110, less bill for medicines of £24. I have sent you a bill for £10 — 0 — 0 thinking it may be of service to you in Custom House. Entry medicines 90 forward by steamer and instructions mailed you under separate cover.

Kindly acknowledge receipt.

Yours truly,

(Sg.) D. C. ABLES, *Sec'ty.*

272 PLAINTIFF'S EXHIBIT "J."

(Indorsed.)

Filed October 30th, 1903. M. T. Simonton, Clerk.

Know all men by these presents, that we, John Alfred Magoon and Dorothea Lamb, of Honolulu, Island of Oahu, Hawaiian Islands, do hereby make, constitute and appoint T. E. Cowart and J. H. Kirkpatrick, of San Antonio, Texas, at present residing in the said Honolulu, being about to depart for Australia, and the other Islands of the Pacific and Indian Oceans, and Africa, our true and lawful attorneys in our names, places and stead to act for us in all matters connected with the African, Pacific and Indian Hagey Company, and for that purpose to establish institutes and to sell the medicines compounded under the formulas belonging to the Company; to sell and dispose of the said formulas in the districts where they may be operating; and to do and perform all other acts and things that may be necessary and proper in the prosecution of the business of the said Company.

Giving and granting to our said attorneys full power and legal authority to do all things in the said premises as fully to all intents and purposes as we might or could do if personally present. Hereby ratifying and confirming all our said attorneys shall do or cause to be done by virtue of these presents.

In witness whereof, we have hereunto set our hands this the tenth day of April A. D. 1897.

(Sgn.) JOHN ALFRED MAGOON.

(Sgn.) DOROTHEA LAMB.

This tenth day of April A. D. 1897 personally appeared before me John Alfred Magoon and Dorothea Lamb, both to me well known, who did individually and severally, solemnly and sincerely declare and state that they had signed the foregoing document freely and voluntarily and for the uses and purposes therein set forth. In witness whereof I hereunto affix my signature and seal of office at the British vice-consulate, Honolulu, the day and year aforesaid.

(Sgn.) THOMAS RAIN WALKER,
[SEAL.] *British Vice-Consul.*

273 PLAINTIFF'S EXHIBIT "K."

(Indorsed.)

Filed October 30th, 1903. M. T. Simonton, Clerk.

AUCKLAND, N. Z., *Oct.* 30", 1897.

Miss Dorothea Lamb, Honolulu, H. I.

DEAR MISS LAMB: Your letter dated Sept. 17", 1897, duly received in course of mail. From the letter written to Mr. Magoon by Mr. Cowart and myself I think you will find every thing explained. I am at a loss to understand how you got so mixed, or, if you say so, how we got so mixed up. We both thank you for your expressions of confidence and cheering words. You may rely upon it Miss Lamb, that we will guard your interests as closely as we would our own.

By to-day's mail you will receive £93 — 1 — 6, less exchange rate. This amount is derived from two sources, £12 — 1 — 6 being the return of the assessment levied in Honolulu, and £81 being 18% on the stock held in your name on the books of the Company. We closed a trade yesterday out of which we received £5000.

We had a deal on foot to form a Company for Sydney on the basis of £25000. £12500 of which was to be sold to a local syndicate £5000 to be paid in cash, and the other £7500 to be paid for as the one-half interest of the syndicate made it.

The project was on the verge of falling through only £3000 of the £5000 having been raised. We found two gentlemen who were willing to close up the gap and put in their £2000, thereby completing the £5000, provided we would sell them a one-half interest in the islands of the Pacific and Indian oceans (not Africa), subject to all prior sales made by us.

The consideration for the one-half interest to be the £2000 cash paid into the Sydney deal and the first £10500 received from the sale of rights in said territory. This is made a first charge on the business. The £3000 paid into the Sydney deal was to be a credit,
274 on the £10500 to be paid. When £7500 more is paid into our hands from the sale of Australasian rights then these two gentlemen have a fully paid up half interest and are entitled to share in the proceeds.

We deemed the trade a good one and have made it, and for-

warded you your part of the money. Now, Miss Lamb, if our action does not meet with your approval, and that of Mr. Magoon, and you are desirous of terminating your business relations with us, we feel that we can send you your original investment. You can use your own judgment in the matter. It is true that it is a highly speculative enterprise, but we have never had any reason to change our ideas about it. Mr. Ables will send you a statement of the business.

Mr. Magoon seems to have lost heart in the business and in us and his letter was a great disappointment to us. The letters written to Dexter were calculated to do us great harm.

Enclosed you will find drafts in favor of Mr. Magoon for the sum of £466 — 0 — 4, less exchange rate, which you will please deliver to him. £61 rebate on original assessment and £405 on stock. 18% was paid on the stock and Mr. Magoon's $12250 investment was reduced 10% the same as yours and all the rest to set over the 1/10 interest given to Dr. Wolfenden that we have written about. You will see that from Mr. Ables' statement.

We are sorry to learn that the business there has not done well. But we feel that had we been there to operate it, all would have been different.

We trust you are well, and will close by sending you our *aloha nui*.

Sincerely yours,

(Sig.) COWART & KIRKPATRICK.

275 PLAINTIFF'S EXHIBIT "I."

(Indorsed.)

Filed October 30th, 1903. M. T. Simonton, Clerk.

AUCKLAND, N. Z., *Oct.* 7, 1897.

Judge Magoon, Honolulu, H. I.

MY DEAR MR. MAGOON: Another mail and no money to send you. I know we will take a lot of cash in before the next mail.

We sold a 1/5 interest in N. Z. for £5000 *pounds* cash. The money was put into a place and furniture that is worth the money. Buying the place has had the effect that I knew it would viz: people are running after us to get an interest in the business. We sold 1/2 interest in Tasmania last week for 8000 sheep and £500. The parties could not raise £500 after agreeing to but paid £250 and took 1/2 less £250. The sheep and lease of the land 24000 acres was valued at £2000. We hope to sell the sheep in a short time. We are offered £5000 for a 1/5 interest in New South Wales by some first class business men of this city. This is cash and they mean business if they can raise the money. They are now seeing what they can do towards raising the money.

We have been with them all the morning. We are having big socials each Friday night and they please everybody. We will likely move into the new place about the 15th.

Ables and Col. Moore have not and will not sign any papers

(Ables did sign the papers for Tasmania) They are very disagreeable but we are going ahead without their consent. They consulted a lawyer and he told them they were in a hop-less minority and the sooner they fell into line the better it would be for them. Their object has been to force us to buy them out.

Ables came to me about two weeks ago and said to me "I know you can easily raise $12000 for my interest and I wish you would
276 do it." I said but Ables we have pooled out interest and the others would not agree to it. He said if you will get a party to put in the money, I will give you or him a power of attorney to handle my interest and will *never* let *anyone* know a word about it. I told Kirk and Daniels of his offer. They have given up all hopes of blackmailing us and are now offering to do better we are paying very little attention to them. I do not tell you this as a secret, you are welcome to write Ables and tell him I wrote it to you.

I have found him to be the man Mr. Gear told me he was. It will take more than Ables and Col. Moore to keep this business from being a success. We are sure to make it come out all right.

We have been very successful in curing our patients and they are staying with us O. K.

We have secured one of the leading physicians in Auckland for 12 mos. for £750 per annum. He has the formula and is preparing it in good shape.

Kirk joins me in sending best wishes to you and Miss Lamb.

I am yours for success,

(Sg.) T. E. COWART.

277 PLAINTIFF'S EXHIBIT "M."

(Indorsed.)

Filed October 30th, 1903. M. T. Simonton, Clerk.

No. 3608.

In the Supreme Court of New Zealand, Northern District.

Between

THOMAS MILNER HARRISON, of Auckland, in the Colony of New Zealand, Solicitor, Plaintiff,

and

T. E. COWART, J. H. KIRKPATRICK, GEORGE D. MOORE, A. E. POWTER, J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, DOROTHEA LAMB, and JAMES WOLFENDEN, Carrying on Business Together in Co-partnership in the Islands of the Pacific Ocean under the Style or Firm of the African Pacific and Indian Hagey Company, Defendants.

Thursday, the 9th day of June, 1898.

Upon reading the affidavit of Thomas Milner Harrison sworn, and filed herein and upon hearing Mr. Christopher James Parr of Counsel for the plaintiff it is hereby ordered that leave be granted to the

plaintiff to serve with the writ of Summons herein the defendants J. H. Kirkpatrick, George D. Moore, A. E. Powter, J. A. Magoon, F. B. McStocker, L. C. Ables, Dorothea Lamb, and James Wolfenden out of the Colony of New Zealand and also that the defendants James Wolfenden, George D. Moore, and J. H. Kirkpatrick, being all resident in Australia, shall file their respective Statements of Defence at the office of this Honorable Court at the City of Auckland in New Zealand within Thirty-five days after and exclusive of the day in which such Writ shall be served upon the said James
278 Wolfenden, George D. Moore and J. H. Kirkpatrick respectively And also that the defendants J. A. Magoon, Frank B. McStocker, Dorothea Lamb and L. C. Ables, all resident at Honolulu, do file their respective Statements of Defence within Forty-two days after and exclusive of the day on which such Writ shall be served upon the said J. A. Magoon, Frank B. McStocker, Dorothea Lamb and L. C. Ables, respectively And also that the defendant A. E. Powter resident in California do file his Statement of Defence within Sixty days after and exclusive of the day in which such Writ shall be served upon him and it is further ordered that the trial of this action shall be held at the first sittings of this Honorable Court at Auckland after the expiration of the above mentioned periods for filing Defences herein.

By the Court

(Sgd.) HENRY C. BREWER,

[SEAL.] *Registrar.*

True copy.

279 In the Supreme Court of New Zealand, Northern District.

No. 3608.

Between

THOMAS MILNER HARRISON, of Auckland, in New Zealand, Solicitor, Plaintiff,

and

T. E. COWART, of Auckland aforesaid, Agent; J. H. KIRKPATRICK, of Sydney, New South Wales, Agent; GEORGE D. MOORE, of Sydney aforesaid, Agent; A. E. POWTER, of San Jose, California, U. S. of America, Hotel-keeper; J. A. MAGOON, of Honolulu, in the Republic of Hawaii, Counsellor at Law; FRANK B. McSTOCKER, of Honolulu aforesaid, Collector of Customs; DOROTHEA LAMB, of Honolulu aforesaid, Spinister; L. C. ABLES, of Honolulu aforesaid, Agent; and JAMES WOLFENDEN, of Melbourne, in Victoria, Doctor of Divinity; Carrying on the Business (Together in Copartnership) of Curing Alcoholism and Narcotism by the Hagey Formulas in the Islands of the Pacific Ocean and under the Style or Firm of The African Pacific and Indian Hagey Company, Defendants.

Take notice that unless within fourteen clear days after and exclusive of the day in which this writ shall be served upon you, you

do file in the office of this Court at Auckland, a statement of your defence to plaintiff's claim, a copy of which is hereunto annexed, the plaintiff may proceed in his action without having it heard in Court. If you file a statement of defence within the time above specified, you are hereby summoned to attend the first sittings of the Court at Auckland, which shall be held after the expiration of twenty-eight days from, but exclusive of the day of service of this writ upon
280 you, and take notice that if you fail so to appear the action may be heard and determined in your absence.

Dated at Auckland the 18th day of April, 1898.

[SEAL.]

To the above-named defendants J. A. Magoon, Frank B. McStocker, Dorothea Lamb, and L. C. Ables, and to the other above named defendants.

N. B.—This Writ is sued out by Christopher James Parr, Solicitor for the Plaintiff, whose address for service is at Nos. 103 & 104 Victoria Arcade, Queen Street, Auckland.

The Plaintiff claim- £19:17:0 for cost of service of this writ and incidental thereto.

This summons must be served on you within six months from the date thereof, or from the date of renewed.

If the last day for delivering your statement of defence fall on a Sunday or holiday, or during the vacation, such statement may be delivered on the day following such Sunday or holiday, or the vacation, as the case may be.

You are specially warned, that, if you do not file your statement of defence within the time limited, the plaintiff may proceed in his action in your absence.

If the claim is for a sum of money, and you pay such sum and costs before the expiration of the time for filing a statement of defence, proceedings in the action will be stayed; if you pay after the expiration of that time you will be liable to pay any further costs your delay may have caused the plaintiff to incur.

If you confess the plaintiff's claim, or any part thereof, you should sign and deliver your confession to the proper officer of the Court before the expiration of the time limited for filing your statement of defence; but you may deliver your confession at any time before the case is called on, subject to the payment of any further costs which your delay may have caused the plaintiff to incur.

281 If you admit only a part of the claim, you may at any time before hearing pay the amount admitted into Court, together with such amounts for costs as you may consider yourself liable, for, and you must forthwith give notice of such payment to the plaintiff. If the plaintiff proceed, and recover no further amount than shall have been so paid into Court, he may be ordered to pay any costs incurred by you subsequent to receipt of such notice as aforesaid.

Summons to secure the attendance of witnesses will be issued on application at the office of the Court.

The office hours are from 10 to 3, except on Saturdays 10 to 1, and except on Sundays and public holidays. During vacation, viz., 20th December to 31st January, the office hours are from 10 to 1. On Saturday during vacation the office hours are 10 to 12.

The Court holds 4 more sittings in the year 1898, which commence respectively

13th June,
25th July,
12th September,
5th December.

282 In the Supreme Court of New Zealand, Northern District.

No. 3608.

Between

THOMAS MILNER HARRISON, of Auckland, in the Colony of New Zealand, Solicitor, Plaintiff,

and

T. E. COWART, J. H. KIRKPATRICK, GEORGE D. MOORE, A. E. POWTER, J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, DOROTHEA LAMB, and JAMES WOLFENDEN, Carrying on Business Together in Co-partnership in the Islands of the Pacific Ocean, Under the Style or Firm of The African Pacific and Indian Hagey Company, Defendants.

Statement of Claim.

Saturday, the 16th Day of April, 1898.

The plaintiff says:—

1. That he is a Solicitor, at present retired from practice, residing at Auckland, in the Colony of New Zealand.

2. That the defendants are the members of a co-partnership carrying on business in New Zealand aforesaid and elsewhere under the style or firm of The African Pacific and Indian Hagey Company.

3. That on the 20th day of September, 1897, at Auckland aforesaid, the defendants, as such partners as aforesaid, entered into a further partnership with plaintiff by and under a Memorandum of Agreement, a true copy whereof is hereto annexed marked "A." It was thereunder agreed that the Colony of Tasmania was to be the place or sphere of the business or operations of the last mentioned partnership, and it was further agreed that the plaintiff
283 should leave or depart from New Zealand and go to Tasmania to manage the said partnership operations or business there.

4. That the plaintiff, on or about the said 20th day of September, 1897, paid the defendants the sum of two thousand pounds (£2,000) as the consideration for his admission into partnership with them as aforesaid and for a two fifth- share in the capital, good will, and profits of such partnership.

5. That by paragraph 4 of the said Agreement the defendants (therein called the said Company) agreed with the plaintiff that if at or before the expiration of a period of six months from the departure of the plaintiff from New Zealand to Tasmania the plaintiff should be dissatisfied with the condition of the said partnership business in Tasmania the defendants would give the plaintiff stock of the market value of an amount equal to the sum paid by the plaintiff to defendants for his admission to the said partnership, that is to say, stock of the market value of two thousand pounds (£2,000) in some district (other than Tasmania) of the said Company's field of operations.

6. That the plaintiff departed from New Zealand to Tasmania on or about the 17th day of January, 1898, for the purpose of managing and carrying on the said partnership business in Tasmania.

7. That the plaintiff arrived in Tasmania aforesaid on the 1st day of February, 1898, and carried on and managed the said partnership business at the City of Hobart in Tasmania from the said 1st day of February, 1898, to the 1st day of March, 1898.

8. That the plaintiff, on or about the 10th day of March, 1898, notified the defendants that he the plaintiff was dissatisfied with the condition of the partnership business in Tasmania.

9. That the plaintiff, on or about the 10th day of March, 1898, made a demand upon the defendants in Sydney, New South Wales, that he the plaintiff required, in terms of paragraph 4 afore-
284 said, stock of the market value of two thousand pounds (£2,000) in some district (other than Tasmania), of the Company's field of operations. But the defendants have not delivered such stock, but have neglected and refused to deliver such stock to the plaintiff.

Wherefore the plaintiff prays judgment for

(1) Two thousand pounds (£2,000) damages for breach of Contract, or

(2) Such further or other order or relief in the premises as to this Honorable Court may seem just.

285 "A."

[N. Z. Stamp 11 1/10/97 T. M. H.]

Memorandum of Agreement.

Memorandum of agreement made this 20th day of September 1897, between The African Pacific and Indian Hagey Company, an association of partnership formed in Honolulu, Republic of Hawaii, April 10th 1897, the said partnership being composed of the following members: T. E. Cowart, J. H. Kirkpatrick, and Geo. D. Moore, of the State of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore and Thomas Milner Harrison both of the City of Auckland in the Colony of New Zealand, parties of the second part.

Whereas the said Company have the exclusive right and title to the Hagey formulas for Alcoholism and Narcotism in and for the Colony of Tasmania and whereas the said Company have by contract entered into the — day of May 1897 w-th James Wolfenden secured certain rights relative to the use of the Thompson formulas for said diseases and whereas the said parties hereto propose to enter into partnership for the purpose of using administer-ng and vending to others the right to use and administer the said remedies in the Colony of Tasmania and in no other place or places.

Now these presents witnesseth:

For and in consideration of the covenants agreements and payments hereinafter named the parties of the first part for themselves individually and the said company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated.

1. That the capital of the said partnership shall be (£5000) five thousand pounds, of which the said Company shall own (11/20) eleven twentieths, in consideration of granting all their exclusive rights to use the said remedies in the said Colony to the said partnership hereby formed; and the said Company will supply the said partnership hereby formed with the said remedies at the cost
286 price thereof, until such time as the formulas for the preparation of the same may be given the said partnership hereby formed, and the said Company will not use the said remedies in the said Colony during the existence of the said partnership hereby formed otherwise than as partners therein; and they hereby convey to the said partnership hereby formed all their rights privileges and recourses against others than the said partnership using the said remedy in the said Colony.

2. That the said Gilmore and the said Harrison have paid the sum of (£2250) two thousand two hundred and fifty pounds to the said Company for the other (9/20) nine twentieths interest in the said partnership hereby formed, the receipt whereof is hereby acknowledged.

3. That the said Gilmore and the said Harrison shall conduct the business of the said partnership in Tasmania each at a salary of

(£40) forty pounds per month to be a first charge on the receipts of the business after the current expenses have been paid. The said Harrison to act as manager of the said partnership hereby formed and the said Gilmore to act as Secretary Treasurer thereof.

4. That if at or before the expiration of a period of six months from the date of the departure of the said Gilmore or the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (£2250) said two thousand two hundred and fifty pounds mentioned in Clause (2) two hereof in some other district of the Company's field of operation in exchange for the portion of the said (2250) two thousand two hundred and fifty pounds taken by him, and the said Company reserve the right either at the suggestion of the partners in Tasmania or at their own suggestion to send one of their own number or some competent man to aid and assist the partners in Tasmania at the same salary and with the same powers as either the said Harrison or the said Gilmore.

5. That the respective interests of the said Harrison and
287 the said Gilmore in the partnership business in Tasmania are as follows, the said Harrison to have a (2/5) two fifths interest for which he has paid (£2000) two thousand pounds as mentioned in Clause (2) two hereof and referred to in Clause (4) four hereof, and the said Gilmore a (1/20) one twentieth interest in the said partnership for which he has paid (£250) two hundred and fifty pounds as referred to in Clauses (2) two and (4) four hereof.

(6) That a fund necessary for the starting of the business in Tasmania shall be raised by the partnership hereby formed, and placed in the hands of the said Gilmore and the said Harrison.

7. That the said Company reserves the right to dispose of a (1/20) one twentieth interest in the partnership hereby formed, for the sum of (£250) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

In Witness whereof the said parties hereto have set their hands this 1st day of October 1897.

T. E. COWART.
J. H. KIRKPATRICK.
J. A. MAGOON,
By His Att'ys, J. H. KIRKPATRICK,
T. E. COWART.
DOROTHEA LAMB,
By Her Att'ys, J. H. KIRKPATRICK,
T. E. COWART.
A. E. POWTER,
By His Attorney, T. E. COWART.
LEMUEL C. ABLES.
FRANK B. McSTOCKER,
Per His Att'y L. C. ABLES.
J. WOLFENDEN.
T. M. HARRISON.
A. E. GILMORE.

Signed in the presence of
W. C. ROBISON, *N. L.*
12—107

288 PLAINTIFF'S EXHIBIT "N."

(Indorsed.)

Filed October 30th, 1903. M. T. Simonton, Clerk.

Oct. 31. ..... £5190 — 0 — 0

Territory.

Cr.

1897.		
Sept. 22.	Gilmore % Tasmania	£250 — 0 — 0
Oct. 11.	Smith & Pollock % N. S. W.....	250 — 0 — 0
" 12.	W. J. Robinson on % of sheep sold him for £500	50 — 0 — 0
" 12.	R. K. Garlick % N. S. W.....	250 — 0 — 0
" 30.	Smith Garlick & Pollock.....	4500 — 0 — 0
		£5300 — 0 — 0

Dr.

1897.		
Oct. 12.	Paid Harrison & Gilmore our part for expenses	110 — 0 — 0
	Bal. to cr. of Territory %.....	£5190

Oct. 31, 1903.

289 PLAINTIFF'S EXHIBIT "O."

(Indorsed.)

Filed November 2nd, 1903. M. T. Simonton, Clerk.

Memorandum of Agreement.

Memorandum of agreement made this 16th day of September 1897, between The African, Pacific and Indian Hagey Company, of the one part, and Alfred Edward Gilmore and Thomas Milner Harrison both of the City of Auckland of the other part.

Whereas the said Company have the exclusive right and title to the Hagey formulas for Alcoholism and Narcotism in and for the Island of Tasmania and whereas the said Company have by contract entered into the — day of May 1897 with James Wolfenden secured certain rights relative to the use of the R. Thompson formulas for said diseases and whereas the said parties hereto propose to enter into partnership for the purpose of using administering, and vending to others the right to use and administer the said remedies in the Island of Tasmania and in no other place or places.

Now these presents witnesseth:

1. That the capital of the said partnership shall be (£5000) five thousand pounds, of which the said Company shall own (11/20) eleven twentieths in consideration of granting the use of the said remedies in the said Island to the said partnership; and the said company will supply the said partnership with the said remedies at the cost price thereof, until such time as the formulas for the preparation of the same may be given the said partnership.

2. That the said Gilmore and the said Harrison have paid the sum of (£2250) two thousand two hundred and fifty pounds to the said company for the other (9/20) nine twentieths interest in the said partnership, the receipt whereof is hereby acknowledged.

3. That the said Gilmore and the said Harrison shall conduct the business of the said partnership in Tasmania, each at a salary of (£40) forty pounds per month to be a first charge on the receipts of the business after the current expenses have been paid.

4. That if at or before the expiration of a period of six
290 months from the date of the departure of the said Gilmore and the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount of the (£2250) two thousand two hundred and fifty pounds mentioned in Clause two hereof, in some other district of the Companie's field of operation in exchange for the portion of the said (£2250) taken by him and the said company reserve the right either at the suggestion of the partners in Tasmania or at their own suggestion to send, one of their own number or some competent man to aid and assist the partners in Tasmania at the same salary and with the same power as either the said Gilmore or the said Harrison.

5. That the respective interests of the said Harrison and the said Gilmore in the partnership business are as follows, the said Harrison to have (2/5) two fifths interest for which he has paid (£2000) two thousand pounds as mentioned in Clause (2) two hereof and referred to in Clause four (4) hereof, and the said Gilmore a (1/20) one twentieth interest in the said partnership for which he has paid (£250) two hundred and fifty pounds as referred to in Clauses (2) two and (4) four hereof.

6. That a fund necessary for the starting of the business in Tasmania shall be raised by the partnership and placed in the hands of the said Gilmore and the said Harrison.

7. That the said Company reserve the right to dispose of (1/20) one twentieth interest in the partnership for the sum of (£250)) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

In witness whereof the said parties hereto have set their hands.

THE AFRICAN, PACIFIC AND INDIAN HAGEY CO.,
(Sg.) T. E. COWART,
J. H. KIRKPATRICK.
(Sg.) JAMES WOLFENDEN,
291 (Sg.) L. C. ABLES, *Sec't'y & Treas.*
(Sg.) A. E. GILMORE.
(Sg.) T. M. HARRISON.

Signed in the presence of
(Sg.) D. T. FOX,
Accountant, Auckland, N. Z.
(Sg.) J. D. O'BRIEN.

292 PLAINTIFF'S EXHIBIT "P."

(Indorsed.)

Filed November 2nd, 1903. M. T. Simonton, Clerk.

Memorandum of Agreement.

Memorandum of Agreement made this 20th day Of September 1897, between The African, Pacific and Indian Hagey Company, of the one part, and Alfred Edward Gilmore and Thomas Harrison both of the City of Auckland of the other part.

Whereas the said Company have the exclusive right and title to the Hagey formulas for Alcoholism and Narcotism in and for the Island of Tasmania and whereas the said Company have by contract entered into the — day of May, 1897 with James Wolfenden secured certain rights relative to the use of the Thompson formulas for said diseases and whereas the said parties hereto propose to enter into partnership for the purpose of using administering and vending to others the right to use and administer the said remedies in the Island of Tasmania and in no other place or places.

Now these presents witnesseth:

1. That the capital of the said partnership shall be (£5000) five thousand pounds, of which the said Company shall own (11/20) eleven twentieths in consideration of granting the use of the said remedies in the said Island to the said partnership; and the said Company will supply the said partnership with the said remedies at the cost price thereof, until such time as the formulas for the preparation of the same may be given the said partnership.

2. That the said Gilmore and the said Harrison have paid the sum of (£2250) two thousand two hundred and fifty pounds to the said Company for the other (9/20) nine twentieths interest in the said partnership, the receipt whereof is hereby acknowledged.

3. That the said Gilmore and the said Harrison shall conduct the business of the said partnership in Tasmania each at a salary of

(£40) forty pounds per month to be a first charge on the receipts of the business after the current expenses have been paid.

293 4. That if at or before the expiration of a period of six months from the date of the departure of the said Gilmore and the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (£2250) said two thousand two hundred and fifty pounds mentioned in Clause (2) two hereof in some other district of the Companie's field of operation in exchange for the portion of the said (£2250) two thousand two hundred & fifty pounds taken by him, and the said company reserve the right either at the suggestion of the partners in Tasmania or at their own suggestion to send one of their own number or some competent man to aid and assist the partners in Tasmania at the same salary and with the same powers as either the said Gilmore or the said Harrison.

5. That the respective interests of the said Harrison and the said Gilmore in the partnership business are as follows, the said Harrison to have a (2/5) two fifths interest for which he has paid (£2000) two thousand pounds as mentioned in Clause (2) two hereof and referred to in Clause (4) four hereof, and the said Gilmore a (1/20) one twentieth interest in the said partnership for which he has paid (£250) two hundred and fifty pounds as referred to in Clauses (2) two and (4) four hereof.

6. That a fund necessary for the starting of the business in Tasmania shall be raised by the partnership and placed in the hands of the said Gilmore and the said Harrison.

7. That the said Company reserves the right to dispose of a (1/20) one twentieth interest in the partnership for the sum of (£250) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

In witness whereof the said parties hereto have set their hands this 21st day of September 1897.

THE AFRICAN, PACIFIC AND INDIAN HAGEY CO.,

(S'g.) By J. H. KIRKPATRICK,
T. E. COWART.
(S'g.) JAMES WOLFENDEN.
L. C. ABLES, *Sec't & Tr.*
(S'g.) A. E. GILMORE.
T. M. HARRISON.

Signed in the presence of
(S'g.) J. B. DANIELS.
(S'g.) D. J. KIRKPATRICK.

294 PLAINTIFF'S EXHIBIT "Q."

(Indorsed.)

Filed November 2nd, 1903. T. M. Simonton, Clerk.

Memorandum of Agreement.

Agreement made this 21st day of September 1897, between Thomas Milner Harrison, and L. C. Ables both of the City of Auckland in the Colony of New Zealand.

Whereas by Agreement date- the 1st Day of November 1896 made between William Cowper Robison, sheep farmer and Lawrence Marshall Grace, Licensed Interpreter, the said Grace sold to the said Robison a Temporary Lease of the lands mentioned in the Schedule hereto, for the sum of five hundred pounds, and whereas the said Robison after the said 1st day of November 1895 undertook to give to said Grace a greater amount than (£500) five hundred pounds for the said Lease, and whereas the said Robison entered into an agreement with the said Harrison Dated the 8th day of December 1896 whereby he transferred a half of his interest in the said Lease to the said Harrison and undertook to indemnify the said Harrison against farther charges than the said (£500) five hundred pounds by the said Grace for the said Lease, and whereas by the said agreement dated 8th December 1896 the said Robison and the said Harrison entered into partnership in the possession of certain sheep grazing on the said lands, and whereas the said partnership was dissolved by an agreement dated the 4th Day of May 1897 made between the said Harrison and the said Robison, and whereas by the said agreement dated the 4th day of May 1897 the said Harrison retained possession of about (500) five hundred head of sheep grazing on the said lands until such time as the said Robison would secure the payment of (£511) five hundred and eleven pounds less the price of the wool clip of the sheep of the said partnership, and whereas the said Harrison has been obliged to pay to Freeman R. Jackson & Co. certain expenses of the said partnership accrued since the shearing of the said wool clip for which the said Robison is liable for one moiety thereof.

Now these presents witnesseth;

1. That the said Harrison hereby assigns to the said Ables
295 all right title and interest he may have in the said Temporary Lease and the sheep grazing on the said lands.

2. That at last shearing of said sheep more than (3500) three thousand five hundred sheep and lambs were shorn, and that since said shearing more than (2300) two thousand three hundred Merino ewes and eighty long wooled rams were purchased by the said Harrison and put upon the said place.

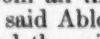
3. That of the sheep enumerated in Clause (2) two hereof not more than ten have been removed from the said place with the knowledge and consent of the said Harrison, except for consumption as mutton by the men working on the place, and the said Harrison

guarantees that the said sheep and the wool clip growing thereon are free from all indebtedness except as herein mentioned.

4. That the said Harrison hereby assigns to the said Ables all indebtedness of the said Robison to him the said Harrison.

5. That the said Ables will release the said Robison from all the said indebtedness, upon the said Robison assigning to the said Ables all interest he may have in the said Temporary Lease and the said sheep grazing on the said lands, and a certain Promissory Note for (£38) given by the said Harrison to the said Robison.

6. That the said Ables will not release the said Robison from any of the said indebtedness until the said Robison deliver to him the said note and that the said Ables on obtaining the said note will release the said Harrison from payment thereof and deliver the same to him.

7. That the said sheep are ear-marked ewes and rams  or wethers the reverse.

8. That in consideration of this assignment the said Ables has paid the said Harrison the sum of (£2000) two thousand pounds the receipt whereof is hereby acknowledged.

THE SCHEDULE.

All those pieces or parcels of land situate in the district of Tauponuiata in the provincial District of Wellington containing 24486 more or less being Tawhai South 2000 acres Okahukura No.
296 7 10000 cares Okahukura No. 8 6766 acres Okahukura No. 8a 592 acres Okahukura No. 8a2 300 acres Okahukura No. 8b 892 acres Okahukura No. 8c & d 892 acres No. 8e & f 892 acres Okahukura No. 8g & h 892 acres Okahukura numbers J. K. 7 L. 600 acres Taurewa No. 2a 500 acres and Taurewa No. 3. 160 acres.

In witness whereof the said parties hereto have set their hands the 21st day of September 1897.

(S'g.) L. C. ABLES.
(S'g.) T. M. HARRISON.

Signed in the presence of
(S'g.) J. B. DANIELS.
(S'g.) D. J. KIRKPATRICK.

297 PLAINTIFF'S EXHIBIT "R."

(Indorsed.)

Filed Nov. 2, 1903. M. T. Simonton, Clerk.

Memorandum of Agreement.

Agreement made this 1st day of October, 1897, between Thomas Milner Harrison and L. C. Ables, both of the City of Auckland, and William Cooper Robison of Kihikihi.

Whereas by agreement dated 21st of September, 1897, between the said Harrison and the said Ables the said Harrison did assign to the said Ables certain claims he had against the said Robison

and certain interests he had in Okahukura and other lands in West Taupo and whereas the said Robison had certain interests in certain sheep grazing on the said lands;

Now these presents witnesseth:

That the said Ables and the said Harrison release the said Robison from all claims whatsoever they may have against him.

2. That the said Robison hereby assigns to the said Ables all interest he may have in the said sheep.

3. That the said Robison hereby agrees to assign to the said Ables at any time upon the demand of the said Ables any interests he may have in the said lands.

In witness whereof the said Thomas Milner Harrison, the said L. C. Ables and the said William Cowper Robison have set their hands the day aforesaid.

T. M. HARRISON.
L. C. ABLES.
W. CR. ROBISON.

Signed in the presence of
J. H. KIRKPATRICK,
Auckland, N. Z.

298 PLAINTIFF'S EXHIBIT "S."

(Indorsed.)

Filed November 2nd, 1903. M. T. Simonton, Clerk.

Liquor Treatment Instructions.

Hagey Treatment.

Examine patients thoroughly before entering treatment, especially as to heart trouble, etc. After

Never use over two or three drops of the hypodermic injection solution to begin with, and gradually increase till patient shows no idiosyncrasy in relation to the drug. Should the patient show the least signs of flightiness reduce the hypodermic dose *at once*. After a little experience in this line a Physician can handle his patient and can tell at a glance whether he is giving sufficient treatment. Often question patients at treatment time as to how they feel, if any dryness in the throat, etc.; no two patients are alike and individual treatment is necessary.

Always be prompt at treatment time and insist that your patients are the same. Run your institute on business principles; it has a good effect. Be kind to your patients, but be firm and when you tell them anything give them to understand that it is law from the word go.

If any patient insists on disobeying the rules, such as going into saloons; drinking on the sly, etc., and will not attend to business, turn him out of the Institute using as much kindness as possible

Your graduates always act as detectives and patients will find it very difficult to take drink on the sly without you finding it out. If for any reason you should suspect a patient of having taken a drink on the sly, convince yourself that it is so first, and then, without saying a word to him at the next treatment time, instead of the regular hypodermic injection give him, One Tenth Grain (1/10 Gr.) of No. 10, carefully prepared a few minutes before, so that you will be ready for him when he presents himself for treatment. It is best to be very guarded, using careful judgment, as regards giving No. 10 to patients seriously affected with heart troubles or when they are in a beastly drunken condition.

Never allow your patient to drink for more than from one to three days after commencing treatment. We furnish you with a bottle of tonic labeled "B tonic;" if your patient is still drinking after two or three days' treatment, instead of giving him the regular whiskey tonic give him a spoonful of B tonic in the same manner as you give the regular tonic treatment; this is milder than the No. 10 and will make the patient quite ill at his stomach as some patients must be made very sick before they will quit.

299

Keep all your medicines and what you give your patient a profound secret and impress upon their minds that the medicine will quiet a sick stomach if they will let whiskey alone, but that the two will not mix.

To quiet a patient who is very nervous the use of bromides (bromidia, etc.) is recommended. The Physician in charge is the best judge of this and when and what to give. These are the main points to be kept in view as to the general mode of running a successful Institute.

Do not take morphine patients until you have treated and cured a few liquor patients; you will then have *have* experience and will know *know* better how to proceed with general treatment for morphine, etc.

Important: Insist on baths being taken at least twice a week; *this must not be omitted.*

We also send you a supply of No. 7; mix one spoonful with two spoonfuls of whiskey.

Questions.

Physician's Examination for Narcotism.

No. 1. When you receive a patient for Morphine, opium, &c., &c., what are the first steps to be taken?

No. 2. Would you tell a patient that it would be necessary to put a guard over him?

No. 3. If he has been taking morphine, &c., hypodermically, how would you proceed and how would you supply the place of morphine?

No. 4. How would you prepare the morphine mixture?

No. 5. How would you prepare the opium mixture?

No. 6. After the patient has been taking the treatment for a few days, and should show signs of flightiness, what would you do?

No. 7. What tonic would you use for Narcotism, and Neurasthenia?

300 No. 8. What hypodermic?

No. 9. In giving patient Institute treatment for tobacco, what tonic would you use?

No. 10. What would you give patient to produce sufficient sleep?

No. 11. How long should a patient be under treatment before he should be off of the morphine, &c.?

No. 12. At this stage will it be necessary to impress upon the guard to be especially watchful?

No. 13. What would you give the patient at this stage to produce quite and allay pain, if any?

No. 14. What else would you give?

No. 15. After the patient has been off of morphine, &c., for a week or at such time as you thought them cured, how would you make a test of it?

No. 16. What would you tell them would be the result if they took any more morphine, &c.?

No. 17. Are baths necessary in this treatment?

301 *Answers to Physician's Examination for Narcotism.*

For the Physician Only.

No. 1. Take all morphine, syringes, &c., &c., away. Examine your patient thoroughly, and ascertain what superinduced the taking of the drug.

No. 2. Tell the patient that after the first week, it will be necessary to put a trusty guard over him or her, and when you do this be sure that the patient has no drugs concealed. Morphine patients will *not* tell the truth when it comes to the matter of taking the drug, and you cannot place one bit of confidence in what they say. They will not tell the truth, none of them, no matter how honest they tell you they are; you must not believe all they say, though you should impress them that you do. Should the patient refuse a guard, tell him you cannot cure them unless under guard, and permission from some of the relatives will put the physician in a position to force the guard upon the patient.

No. 3. Remove all morphine as above, and supply the place with morphine mixture.

No. 4. Fill an 8 ounce bottle with water and add one dr. bottle of morphine sulphate to it, seeing that it is well dissolved. Give your patient a teaspoonful of this mixture every two hours, should they require it that often. Fill the bottle full of water every morning to supply the amount taken out the day before. You need not let your patient know that it is water you refill with, unless you choose to do so. At the end of 10 or 12 days the morphine will be getting very weak and the patient will be getting very little if any morphine,

and at this time you should have another bottle (exactly like the one containing the morphine mixture) and fill it with water adding quinine or nux vomica, to give it the bitter taste, and make a secret exchange with your patient.

302 No. 5. Take the usual morphine mixture, and add sufficient tonic (morphine) to give it the color.

No. 6. Decrease the hypodermic injection.

No. 7. Morphine tonic.

No. 8. Same as liquor.

No. 9. Morphine tonic; also give morphine tonic for the combined habit of morphine and liquor.

No. 10. Physicians should use their best judgment in giving some of the best and most harmless hypnotics such as sulfonel, antikamnia, &c.

No. 11. Usually not over 12 days; in rare cases, a few days longer may be necessary.

No. 12. Decidedly so. Should not leave his patient under any circumstances.

No. 13. Suppositories are good; the physician should use his best judgment.

No. 14. Codine is splendid substitute for morphine, and does not leave any appetite for the drug.

No. 15. Give them dose of quinine, and tell them it was morphine, then immediately follow with No. 10 instead of the regular injection.

No. 16. It would kill them.

No. 17. Certainly they are.

No. 10 will invariably break up paroxysms; even B. Tonic is splendid. Of course judgment must be used by the physicians. No 10 has often broken up delirium tremens as well as hysterics.

303 *Tobacco Habit.*

Instructions. Chewing.

The patient is advised, if the habit is that of chewing, to discontinue the use of tobacco at once, and substitute the "LANGE'S PLUG" or chewing gum which is furnished with the remedy. When the desire to chew, cannot be resisted, the patient should take a chew of the Plug or gum chewing in the same manner as if it was tobacco, swallowing the saliva, as no harmful results follow. As the remedy continues to make its effects felt, and the nicotine poisons are eliminated, drop the use of the Plug or gum and continue with the treatment.

Smoking.

If the habit is that of smoking, the patient is advised to frequently place a cigar in his mouth, and indulge in what is known as a "dry smoke" and to light his cigar only when the desire is too strong upon him. As the remedy begins to make its effects felt the patient will find that he can drop one smoke after another, until finally smoking

becomes obnoxious to him, and so the use of tobacco in any form for all time.

304 Cigarrette Smoking.

For this habit the patient must stop their use at once, substituting cigars as directed in the tobacco smoking habit. Follow the instructions already given you and handle the patient accordingly.

Take a Test.

It is a fact known to nearly every user of tobacco, that the first chew or smoke indulged in when a boy, causes a deathly sickness, the treatment places a patient exactly in the same condition or at least that is what you ought to impress upon the mind of your patient. After your patient has been off of tobacco about 10 days tell him you want to make a test, and just before "shot time" supply him (or better still let him supply himself) with a good cigar, and see that he does not light it till just before shot time then give him No. 10 instead of his regular injection. Follow the same instructions for chewing or cigarrette smoking.

PLAINTIFF'S EXHIBIT "T."

(Indorsed.)

Filed November 2nd, 1903. M. T. Simonton, Clerk.

HOTEL METROPOLE,
SIDNEY, 10*th March*, 1898.

J. H. Kirkpatrick, Esq., Hagey Institute.

DEAR SIR: You asked me yesterday to make a written offer of what I should be willing to take in settlement of my claim against the partnership of which you are a member. My claim, of course, is for stock of the market value of two thousand pounds. I placed the matter some time ago in the hands of Mr. Parr, my solicitor at Auckland, and any offer I herein make is not to prejudice any action of his in this matter, either, past, present or future.

I should, at present, in settlement of this matter be willing to accept (£1900) one thousand nine hundred pounds cash and one hundred pounds stock in any of your companies now formed. This offer does not remain open but must be accepted immediately. 10/3/98.

Yours truly,
(Sg.) T. M. HARRISON.

P. S.—In event of this offer being accepted the cash payment must in some way be secured before the end of this week.
(Sg.) T. M. H.

305 In the Supreme Court of the Territory of Hawaii.

THOMAS MILNER HARRISON, Plaintiff,
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, and DOROTHEA EMERSON (*née* LAMB) ET ALS., Defendants.

It is hereby stipulated and agreed between the parties to this action that the plaintiff may remove from the files of this Court the Memorial of Judgment obtained by him in The Supreme Court of New Zealand against all the defendants herein except Powter and Wolfenden; and that a copy of said Memorial of Judgment certified by the Clerk of this Court to be true may be substituted on the said files for the said Memorial of Judgment; and that said copy so certified as true will be accepted in evidence in all the Courts of this Territory by all the parties to this action as though it were the said original Memorial of Judgment.

Dated Honolulu, H. T. 18th January 1905.

(Sgn.) KINNEY, McCLANAHAN & COOPER,
Attorneys for the Defendants.

(Sgn.) T. M. HARRISON, *Plaintiff.*

Endorsed and filed Jan. 20, 1905. Geo. Lucas, Clerk.

306 PLAINTIFF'S EXHIBIT "U."

(Indorsed.)

Filed November 2nd, 1903. M. T. Simonton, Clerk.

In the Supreme Court of New Zealand, Northern District.

No. 3608.

Between
THOMAS MILNER HARRISON, Plaintiff,
and
THOMAS EDWARD COWART, J. H. KIRKPATRICK, GEORGE D. MOORE, A. E. POWTER, J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, DOROTHEA LAMB and JAMES WOLFENDEN, Carrying on Business Together in Co-Partnership in the Islands of the Pacific Ocean under the Style or firm of "The African Pacific and Indian Hagey Company," Defendants.

This action coming on for trial on the thirteenth day of June 1899 before His Honor Mr. Justice Conolly and a common jury of twelve persons, after hearing the plaintiff and the defendant Thomas Edward Cowart, and the evidence by them respectively adduced and it appearing that the defendants J. H. Kirkpatrick, George D. Moore,

J. A. Magoon, F. B. McStocker, L. C. Ables, and Dorothea Lamb have been duly served with the Writ of Summons and Statement of Claim in this action but have not filed any defence thereto and the jury having found that the plaintiff is entitled to judgment for the sum of two thousand pounds (£2000).

It is adjudged that the plaintiff recover against the said defendants Thomas Edward Cowart, J. H. Kirkpatrick, George D. Moore, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb the sum of two thousand pounds (£2000).

Dated the 13th day of June 1899.

[Seal of the Supreme Court of New Zealand.]

By The Court,

R. G. THOMAS,
Deputy-Registrar.

In the Matter of the Hereinbefore Typewritten Memorial of Judgment.

306½ I, Henry Clayton Brewer, of the City of Auckland, in the Colony of New Zealand, Registrar of the Supreme Court of New Zealand, Northern District, at Auckland aforesaid, do solemnly and sincerely declare.

1. That I am the Registrar of the said Court, Northern District, at Auckland aforesaid, and the Legal Keeper of the Judicial Record of which the said Memorial is a true copy.

2. That the seal attached to the said Memorial is the seal of the said Court, and the signature "R. G. Thomas" attached to the said Judgment is the signature of my Deputy-Registrar.

3. That the seal attached to this Declaration is the seal of my office as Registrar aforesaid.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an act of the General Assembly of New Zealand intituled "The Justice of the Peace Act 1882."

HENRY CLAYTON BREWER.

Declared at Auckland aforesaid this fifth day of October 1899, before me.

[Seal of Registrar Supreme Court of New Zealand.]

JNO. C. BASSETT,
A Solicitor of the Supreme Court of New Zealand.

I, Edward Tennyson Conolly certify.

1. That I am the judge of the Supreme Court of New Zealand, who presiding alone, tried the action-at-law mentioned in the hereinbefore typewritten Memorial of Judgment.

2. That the hereinbefore written signature "Henry Clayton Brewer" is the true signature of the Registrar of the said Court, Northern District at Auckland aforesaid.

3. That the said Registrar is the Legal Keeper of the Judicial Record of which the hereinbefore typewritten Memorial of Judgment is a true copy.

4. That the hereinbefore Declaration made by the said Registrar is a corect form of attestation according to the law of New Zealand, and subjects *to* said Registrar to the pains and penalties of prejury, if false.

EDWARD TENNYSON CONOLLY,
One of the Judges of the Supreme Court of New Zealand.

I Frank Dillingham, Consul of the United States for the Colony of New Zealand, hereby certify.

That the above signature "Edward Tennyson Conolly" is the true signature of His Honor Mr. Justice Conolly, the Judge of the Supreme Court of New Zealand, who, presiding alone, tried the action-at-law mentioned in the hereinbefore typewritten Memorial of Judgment.

[SEAL.]

FRANK DILLINGHAM,
Consul of the United States for the Colony of New Zealand.

307 I, George Dunnet, Junior Consul of the Republic of Hawaii for the Colony of New Zealand, hereby certify.

That the above signature "Edward Tennyson Conolly" is the true signature of His Honor Mr. Justice Conolly, the Judge of the Supreme Court of New Zealand, who, presiding alone, tried the action-at-law mentioned in the hereinbefore typewritten Memorial of Judgment.

GEORGE DUNNET,
Junior Consul of the Republic of Hawaii for New Zealand.

I, George Lucas, Clerk of the Supreme Court of the Territory of Hawaii, hereby certify, that the above typewritten document is a true copy of a Memorial Judgment, filed, in the action-at-law between Thomas Milner Harrison—*vs.*—J. A. Magoon, L. C. Ables, F. B. McStocker, *et als.* that, according to a stipulation filed by the parties to the said action; is about to be removed from the files of this Supreme Court for the Territory of Hawaii, and this copy substituted therefor.

Dated Honolulu, H. T. 20th January 1905.

(S'g'n.)

GEORGE LUCAS,
Clerk of the Supreme Court for the Territory of Hawaii.

308 DEFENDANTS' EXHIBIT "1."

(Indorsed.)

Filed Oct. 30th, 1903. M. T. Simonton, Clerk.

N. Z. HAGEY INSTITUTE, LTD., *Jan.* 21*st*, 1898.

Per "Mariposa."

DEAR MAC: I had until late tonight expected to return by this steamer but have just concluded to run over to Sydney and Melbourne and will leave here Monday and will be home by next steamer.

My friend Connelly returns to the U. S. by next "Alameda." I note in Magoon's letter to Dexter that he (Dexter) is to act for J. A. M., Dora Lamb and yourself. But as you said nothing regarding the matter to me, I have done nothing in the matter and as it is a matter that will keep, will say no more until I see you. I think J. A. is making a mistake and think Dexter showed good judgment in not putting in the papers here the notices as directed they could do no good and would I am sure some harm.

I am leaving my power of attorney with Kirkpatrick and were I advising you, I would say do the same, but as I have said it is a matter that will keep.

Yours Faithfully,

LEM C. ABLES.

309 DEFENDANTS' EXHIBIT "2."

(Indorsed.)

Filed Oct. 30th, 1903. M. T. Simonton, Clerk.

THE HAGEY INSTITUTE,
AUCKLAND, N. Z., *Sept.* 2, 1897.

MY DEAR MAC: I did not write you last mail but am presuming you heard from me, and I am not writing you much today. I hope you keep your own council as I think this between you and I that I have my hands full to get *anything* for you and I to say nothing of the others, and as Magoon has put his affairs with the other parties I prefer it remain that way. I am giving you my opinion in a very few words. *We are in a box* and the only way to get out is to hang on and if you die and I die I will do *my best* to see they go down in the boat with me. It is a hard go and I am just about out of meat but I still live. I can't enter into particulars, it would do no good and it is beyond my powers to do the subject justice. Keep this under your own vest. Write me, and believe me

Yours Faithfully,

LEM C. ABLES.

310 DEFENDANTS' EXHIBIT "3."

(Indorsed.)

Filed Oct. 30th, 1903. M. T. Simonton, Clerk.

AUCKLAND, N. Z., *Oct. 1st*, 1897.

DEAR MAC: Yours to hand and the contents all noted but I must say that part relating to business is beyond my understanding and leads me to believe that you cannot comprehend the true situation of affairs here. I mail you statement of affairs for months endings Aug. 31 and Sept. 30, and presume Mr. Cowart & Kirkpatrick are writing Magoon undoubtedly they will write in glowing colors of the business which if it is all correct all of us are O. K. I will simply say this I personally can't see it in that light. I wish I could. I certainly would feel better satisfied. In my statements I have not said anything of the new plan of operations as outlined by them. I only know that some parties here have gone in with us and they put up enough to purchase a house and lot, furniture *and* etc., and the people who put up the money hold a lien on the same and are the managering directors and are guaranteed 10% on their investment. While there are some features in the plan I heartily approve of I did not think enough of the scheme to sign any of the papers. Neither did Col. Moore. Now then Mc., I can not enter into all details and explain in the time the status of how things stand, and if I was to write a book many things would look to you so absurd that you would believe me either a liar or a fool or probably both. I figure it this way, we are in a copartnership and they are the managering partners and we are also bound to pool our interest and not sell without the consent of the other partners. I may be wrong, but I think we are taken in and done for, and that we will never see our money again. Mind you Mc. this is simply my individual opinion and I don't want you to use it only in making your own deductions. I can't stay here the balance of my life and live on wind, and to prove to you that I am in earnest in my belief I want to tell you this I am trying to make a deal with them to set me off with a piece of
311 territory to work on my own a/c I don't think they will even do this but if they do, I will reserve the right for you to take you- choice either to leave your interests as they are with them or to take a part of the territory with me. I don't want to decide this question for you or any one but myself. I have thought of every plan possible to try and get out and this plan I admit is something like the dying man and the straw but I have fully decided this is my last chance. You can say hold on and do this and do that, but I tell you old man, this is Hell, and I can't live even in Hell on nothing. I never put in such a time since I was born and I can't hold out any longer. I want you to get me a copy of agreements and copy of all papers appertaining in any way to this business. The ones I had I lent them for references and they will not let me have them back again. I paid them for medicines from Honolulu, $230, or £47—00

this was supposed to be for 46 treatments put it really treated only about 25 patients they stated Dr. Wayson had written for that amount, find out if the money has been received in Honolulu, if not and we owe the institute there anything have them send me a bill asking the same be remitted. Also find out for me what the Institute there can furnish me the treatments F. O. B. there guaranteed the Simon pure article and to be the full compliment necessary for a patient; don't forget this.

One thing more, and I will close Col. Moore and I have been thinking and talking of his going to Honolulu and Texas by this steamer we are anxious to put ourselves right in the eyes of you at Hono. and those we believe to be interested back in Texas. Moore has no money neither have I unless I float a loan and as it would take about $600 to make the trip I have concluded at the last moment not to borrow the money. If it was sure to be proportioned fairly between all parties interested I am sure it would be money well invested but I can't take all the chances.

I have just enclosed herewith a letter from Beal & Beole this just now came to me. I think the same self explanitory. I call it a little game of bluff as I have told them I would not sign. I don't
312 propose replying to it. I believe I said Beal is to have in addition to fees the amount of £1000 stock my authority is Mr. K. This is for working a scheme that not a penny goes to our Treasury.

But enough for this time only this don't forget to give me what I have asked for. I don't know of course, how J. A. M. is hooked up I only imagine that he would put more stock in them than he would in me, that of course, is his privilege.

Certainly hope I am wrong in my conclusions and if so, I will be willing to acknowledge my mistake at present Daniel's is the great mind and confidential advisor.

Trusting this finds yourself and family well and prospering, I am with kind regards to them all

Yours faithfully,

L. C. ABLES.

Cash	£320 — 12 — 9	
Stock %	20487 — 17 — 2	
T. E. Cowart stock.....		5713 — 4 — 0
J. H. Kirkpatrick "		5713 — 4 — 0
A. E. Powter "		2062 — 6 — 0
G. D. Moore "		371 — 6 — 0
J. A. Magoon "		2250 — 0 — 0
L. C. Ables "		1440 — 0 — 0
F. B. McStocker "		900 — 0 — 0
Dora. Lamb "		450 — 0 — 0
J. Wolfenden "		2100 — 0 — 0
T. E. Cowart Private.....		190 — 0 — 0
J. H. Kirkpatrick "		190 — 0 — 0
J. Wolfenden "		57 — 16 — 4
L. C. Ables "		190 — 0 — 0
J. B. Daniels "	84 — 0 — 0	

Expense	1505 — 7 — 5	
Alchoholism		479 — 6 — 0
Morphine		26 — 5 — 0
Nervousness		14 — 10 — 0
Territory		250 — 0 — 0
	22397 — 17 — 4	22397 — 17 —4

313 *Trial Balance August* 31, 1897.—*M. T. Simonton, Clerk.*

Cash on Hand	£159 — 3 — 6	
Stock %	20487 — 17 — 2	
T. E. Cowart stock %		5713 — 4 — 0
J. H. Kirkpatrick " "		5713 — 4 — 0
A. E. Powter " "		2062 — 6 — 0
Geo. D. Moore " "		371 — 6 — 0
J. A. Magoon " "		2250 — 0 — 0
L. C. Ables " "		1440 — 0 — 0
F. B. McStocker " "		900 — 0 — 0
Dora. Lamb " "		450 — 0 — 0
J. Wolfenden " "		2100 — 0 — 0
T. E. Cowart Private %	5 — 0 — 0	
J. H. Kirkpatrick " "	5 — 0 — 0	
J. Wolfenden " "	35 — 18 — 8	
L. C. Ables " "	5 — 0 — 0	
J. B. Danieis	64 — 0 — 0	
Expense	605 — 18 — 8	
Alcoholism collects		338 — 13 — 0
Morphine "		26 — 5 — 0
Nervousness "		3 — 0 — 0
	£21367 — 18 — 0	£21367 — 18 — 0

Aug. 31, 1897.

Amount due not collected £371 — 7 — 0.

Of Expense % £605 — 18 — 8 abount £100 is in furniture and *furniture.*

The amounts charged to personal % is the amounts drawn by the several parties on % of salaries due them.

The amount of stock to the several parties is on the basis of £21000 for N. Z. and Australia to which Dr. Wolfenden was taken in the Company giving him a 10% interest, which was I believe fully explained by Mr. Cowart & Kirkpatrick in letter to J. A. Magoon. Aside from this the territory of Africa remains the property of the following as per statement on page 3.

314 *Recapitulation.*

Cash brought from Honolulu	£512 — 2 — 10
Collected from Alcoholism treatment	338 — 13 — 0
" " Morphine "	26 — 5 — 0
" " Nervousness	3 — 0 — 0
	£800 — 0 — 10

Paid for Sundry Expenses ..	£605 — 18 — 8	
" to Cowart %	5 — 0 — 0	
" " Kirkpatrick	5 — 0 — 0	
" " Ables	5 — 0 — 0	
" " J. Wolfenden	35 — 18 — 8	
Balance Daniels	64 — 0 — 0	
Balance of Cash	159 — 3 — 6	
	£880 — 0 — 10	£880 — 0 — 10

E. & O. E.
(Sg.) L. C. ABLES, *Treasurer.*

Auckland, N. Z., Sept. 9, 1897.

African Territory $500.00

To Sundries.

T. E. Cowart.....	$15114.30
J. H. Kirkpatrick	15114.30
A. E. Powter	5456.20
George D. Moore	981.90
J. A. Magoon	5952.30
L. C. Ables	3809.50
F. B. McStocker	2381. "
Dora. Lamb	1690.50
	$50000.00

315 DEFENDANTS' EXHIBIT "4."

(Indorsed.)

Filed Oct. 30, 1903. M. T. Simonton, Clerk.

HAGEY INSTITUTE, AUCKLAND, 11/26/97.

MY DEAR MAC: Yours and one from J. A. M. to hand by mail the lat-er I have neither time or inclination to answer as regards his power of attorney. I haven't asked for it and would not of had it, if it had been offered me, that as Treasurer he looks to me & etc. I have done my duty as best I could and all moneys due him have been paid his legal representative. Regarding all your suggestions I can only say as I have said before you know nothing of the situation and it is beyond me to explain it and I do not intend trying. I quite agree with Col. Moore both C. & K. have many fine qualities, as regards the business Cowart is the whole works and he knows nothing of business, he catches suckers and when there are no suckers he is out of his element. I am going to do this I give away my inter-st to a friend of mine J. D. Connelly and if he ever gets anything he divides. I expect to leave here in a few days for Sidney and from there home. The project which they got into and the one I would not sign is comeing just about as I prophesized, and I can

stand it no longer. I don't think there is anything to be gained by sending John Good here at present. However, if you and Magoon think so, don't hesitate to cancel my power of att'y, and do so my idea is to wait until you sue me or hear from me again. I like John Good as you know he is my particular friend but Connelly is the man if he can be got. I have been nearly worked to death lately but have found time nights to make a copy of my books, which I will carry away with me. We have had no fights lately as I found myself alone and could do nothing as I wrote before, I have made a hard fight and I don't feel that I have been appreciated. Cowart pretends to have some schemes on, what they are I don't know. We are running behind fast and are out of coin. Cowart K. Wolfenden and myself have lent the Co. money. I put up £14 for myself and £9 for your or 1%, how the expenses are to be met is beyond me.

I send you copy of Oct. Trial Balance as something may keep
316 me in the Colonies you had best write me and send care Steward of steamer and if they do not see me have them bring letters back to Honolulu.

I can think of nothing more only to say, this J. D. Connelly is the late U. S. Consul here and is a gentlemen and a man of brains and is popular here he knows all the men here who have associated themselves with the Hagey and is well posted regarding affairs here. If you or Mr. Magoon care to write him I believe he could give you some facts worth knowing.

With nothing more and with kind regards to all.

I am Faithfully Yours,

(Sg.) L. C. ABLES.

317 *Trial Balance Oct.* 31, 1897.

C. B. Cash	94 — 7 — 8	
1. Capital Stock	21000 — " "	
3. T. E. Cowart stock %		5713 — 4 — "
4. J. H. Kirkpatrick "		5713 — 4 — "
5. A. E. Powter "		2062 — 6 — "
6. Geo. D. Moore "		371 — 6 — "
7. J. A. Magoon "		2250 — 0 — "
8. L. C. Ables "		1440 — 0 — "
9. F. B. McStocker "		900 — 0 — "
10. Dora Lamb "		450 — 0 — "
11. J. Wolfenden "		2100 — 0 — "
18. J. B. Daniels		30 — 0 — "
25. Expense	2105 — 1 — 4	
32. Alcoholism		1199 — 15 — 6
40. Morphine		84 — 0 — 0
43. Nervousness		14 — 10 — 0
44. Territory		5190 — 0 — 0
46. E. Griffin	1 — 0 — 0	
51. Dividend	3780 — 0 — 0	
53. A. W. Currie	26 — 5 — 0	
" H. J. Ellis	26 — 5 — 0	
" G. F. Hill	11 — 5 — 0	

54. D. T. Fox	21 — 5 — 0		
" Rob't Rew	16 — 5 — 0		
" Sir Morris Rake	13 — 15 — 0		
55. Miss Oldham	1 — 5 — 0		
" R. G. Bromley	26 — 5 — 0		
" Geo. H. Campbell	11 — 5 — 0		
56. M. O'Brion	21 — 7 — 6		
" R. A. Case	26 — 5 — 0		
" Hugh Kirkwood	26 — 5 — 0		
57. Alex. McMintie	13 — 19 — 0		
	27222 — 0 — 6	27518 — 5 — 6	

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Amts. brot. Ford.....	£27222 — 0 — 6	27518 — 5 — 6
57. Dr. Bewes	26 — 5 — 0	
" Harry Meyers	21 — 5 — 0	
58. F. A. Chapman	16 — 5 — 0	
" Jas. Pollock	26 — 5 — 0	
59. John Cafferty	26 — 5 — 0	
" Joe Hemns	26 — 5 — 0	
" Mis. D. Archer	16 — 5 — 0	
60. Wm. T. Reardon	26 — 5 — 0	
" Joseph Gilmore	21 — 5 — 0	
" C. J. Hall	21 — 5 — 0	
61. Wm. W. Courer	26 — 5 — 0	
" Henry Le. Houx	21 — 5 — 0	
	£27518 — 5 — 6	27518 — 5 — 6

319 DEFENDANTS' EXHIBIT "5."

(Indorsed.)

Filed Oct. 30th, 1905. M. T. Simonton, Clerk.

SEPT. 23RD, 1897.

Ruby A. Dexter, Auckland, New Zealand.

MY DEAR RUBY: This will serve to introduce you to Messrs. Cowart and Kirkpatrick with whom Miss Lamb and I are associated in the business of the Hagey Institute.

We wish you to represent us in ascertaining the exact financial condition of the business at Auckland. L. C. Ables, whom you have doubtless met down there, was to have sent us full particulars of the business and as he has entirely failed to do so, we would be glad to have you represent us in the matter. Mr. Cowart and Kirkpatrick will give you any assistance necessary.

There is another matter that we wish you to undertake for us. Messrs. Cowart and Kirkpatrick have signed, or are about to sign, an agreement, guaranteeing to certain gentlemen in Auckland ten per cent. on an amount of money to be invested in the business.

In a moment of enthusiasm they have appeared entirely to overlook the fact that according to our agreement they cannot bind the members of the company in any way, I think that immediately the fact is put before them they will see the necessity of explaining to these gentlemen that they had exceeded their authority, as Miss Lamb and I refuse to be bound by any such agreement on their part. Should they have signed the agreement and bound us and should they not see the necessity of withdrawing such an agreement, then we wish you without any delay to call upon the gentlemen and notify them that Cowart and Kirkpatrick have exceeded their au-
320 thority. I feel sure, however, that this will be unnecessary when Cowart and Kirkpatrick realize what they have done, they will do all they can to rectify such an error.

This business is of great importance to us and we should like you to attend to it at your earliest possible convenience and not to allow anything to prevent you from carrying out exactly what we have told you.

With aloha from us both,

We remain,

Yours very truly,

J. ALFRED MAGOON,
DOROTHEA LAMB.

321 DEFENDANTS' EXHIBIT "6."

(Indorsed.)

Filed Oct. 30th, 1903. M. T. Simonton, Clerk.

SEPT. 23RD, 1897.

Ruby Dexter, Care of Dexter and Crozier, Auckland, New Zealand.

DEAR RUBY: We enclose you herewith a copy of letter to Messrs. Cowart and Kirkpatrick of the Hagey Institute. We wish you to represent us in ascertaining the exact financial condition of the business at Auckland. According to our agreement the business cannot contract any liabilities of any nature, a fund was provided which was considered sufficient to pay all the expenses of the establishing of the business and no liabilities beyond this were to be erected. We asked Mr. Ables to give us a regular statement of the business which he has utterly failed to do, I understand that he is quarrelling with Cowart and Kirkpatrick. What we are willing to do is to sell out our interest there, the actual cash we have invested is about Twenty-one Thousand Dollars, for this we ought to get at least Thirty Thousand Dollars. I do not wish for you to make a propostion for this but invite them to make a proposition and then attempt to make the very best possible terms that you can from them and let us know the result of what you have done. Any sale must be for spot cash and nothing else. You will see by the enclosed letter that Cowart and Kirkpatrick have attempted to make an agreement with certain gentlemen there whereby a certain amount of money was to be put

in the business and a guarantee of 10% on the investment given.
This is absolutely without authority and must be immedi-
322 ately remedied. Tell Cowart and Kirkpatrick that your instructions are peremptory that no such agreement is to be entered into and in case such agreement shall have been already made, tell them they must immediately procure its rescission. Do not delay at all in this matter, in case they fail to accomplish it within a reasonable time, say two or three days, then you will be obliged to see the parties with whom the agreement has been made and notify them that it is without authority. This Matter is of Great Importance because these men must not be misled into investing money under a mistaken apprehension of the fact to their detriment. I am sure that Cowart and Kirkpatrick would not do anything to prejudice our common interest but they certainly have been misled by their enthusiasm into going beyond anything that I ever dreamed of.

In case you continue to represent us there in this matter you might state what your charges would be for doing it per month. Knowin- that your time is valuable we expect to give you what is reasonable for your services.

I learn from your mother that you are doing well and are prosperous in your business. Hoping that such will continue to be the case,

I remain,

Yours very truly, J. ALFRED MAGOON.

323 DEFENDANTS' EXHIBIT "7."

(Indorsed.)

Filed Oct. 30, 1903. M. T. Simonton, Clerk.

SEPT. 23RD, 1897.

FRIENDS COWART AND KIRKPATRICK: Your letters and enclosures came duly to hand last Saturday and we thank you for the same.

I do not fully understand the meaning of the document that you sent to us. You will see by the Articles of Co-partnership that the Company is to create no liabilities whatever and it is incomprehensible to me how you would entertain a proposition to guarantee to any one 10% or any other sum. I know how anxious you are to make the business succeed and perhaps in a moment of enthusiasm when you have so much at stake, you have been tempted to entertain this kind of a proposition but it is not in my opinion a business proposition that would have a tendency to benefit either you or us, and it is hardly necessary for me to say that you can under no circumstances, make an agreement binding the company or the members of the company to anything. I had full confidence in you both when Miss Lamb and I gave you the Power of Attorney but if I thought there was any possibility of your even entertaining such a proposition * * * as the one submitted to us, I should revoke it immediately. Of course we are very much disappointed in Ables

and in view of that fact we decided to ask Mr. Ruby Dexter to work with you in our common interest so you will kindly give him such data as he may wish for concerning the condition of the business. I do this with no intention of annoying or embarrassing you in the prosecution of the work, but we must have a statement of the financial condition of the business. Of course you were not expected to give this but as we must have it perhaps you will give it to us * * * with Ruby Dexter so that we can get the exact figures. In this connection I will also say that in sales of territory nothing but cash can be accepted, any formation of new companies for the purpose of purchasing real estate or anything else does not belong to our business.

324 I wish to say on behalf of Miss Lamb and myself that in case Ables continues to act the way you state we would not consent to the payment of his salary, and should want you to assist us in discontinuing him as Treasurer. Of course this must rest in your hands as you are on the grounds and know what is best to do.

The business here has entirely collapsed. It seems to me to be misleading in view of what we have written to you to state that 5% a month is paid. It is true that the dividends were paid of 5% each but that is all. I do not wish to be put in a position of endorsing anything that is not litterally true. The formula is undoubtedly one of the best things in the way of medical discoveries known and does not require any misleading statements to bolster it up. In addition to the reluctance that I have to father a misleading statement, it certainly would be a damaging thing for you to ask people in Auckland to believe you when it is absolutely certain that within a short time they will find out the true facts namely that the cure is not infallable.

Hoping that you are well and with our best wishes.

I remain,

Yours very truly,

(Sg.) J. ALFRED MAGOON.

325 DEFENDANTS' EXHIBIT "8."

(Indorsed.)

Filed Oct. 30th, 1903. M. T. Simonton, Clerk.

Dictated.

DEC. 16, 1897.

DEAR RUBY: I was very much disappointed in not receiving a letter from you by the last mail. I know full well that you said you could not represent me, but I was in hopes that you could do all that I required of you in my last letter. Despite the fact that you cannot represent me, I shall ask you to do this favor for me. I wish you to do what you can to carry out the instructions contained in this letter, and when that is accomplished, I feel that I will not be obliged to trouble you further. I enclose a check for five pounds, with which I wish you to retain, in your judgment, the best lawyer in Auckland,

a man that is thoroughly honest and reliable, and who understands his business. Before you pay him the money, state the nature of the business to him, agree with him what his full fee will be In no case will I agree to pay at this time more than twenty pounds. I think you will be able to get a good man under this arrangement. I wish this lawyer to read carefully a copy of a letter enclosed, the original of which is addressed to Messrs. Cowart and Kirkpatrick and sent them by this mail, and I should like the lawyer to read my prior letters to you. L. C. Ables has a copy of the agreement under which we started out to do business with the Hagey formulas. I think that copy can be obtained, or a copy made of it, and possibly the original may be found of record. Cowart and Kirkpatrick were authorized to represent me by power-of-attorney only with reference to
326 matters under and in accordance with that agreement. I do not know whether they have violated the agreement or not, or whether they have attempted to make me liable in any way; but I have an indefinite dread that they may do something in this connection prejudicial to my interest, and which may cause me annoyance or loss, and so at all events I am determined to put an end forever to any relations that exist between them and me and whatever loss devolves upon me by reason of so doing I will have to submit to it. I do not accuse C. & K. of dishonesty but I must know where I stand, and whatever interest I may have in the Hagey formulas or in the business connected therewith in common with C. & K. I want to dispose of to them. I will take any reasonable amount that I can get, in cash, and leave that entire- to the discretion of yourself and the lawyer whom you may employ after looking into the matter. If no settlement can be made with them on a cash basis, I will take a joint and several promissory note of Cowart and Kirkpatrick for whatever amount you agree upon with them. I said in my last letter that I would take $13,500., that Miss Lamb would take $2650., and F. B. McStocker $5,000. Get these amounts in cash if possible, or if that shall be impossible, take whatever sums that you think is proper under the circumstances, in cash. I think they would be willing to give some cash, and their notes for the balance. This would be better than nothing. Make the best terms that you can with them under all the circumstances, and we will be satisfied. Do nothing without the consent and advice of the lawyer whom you shall employ in my behalf, and any settlement that said lawyer makes I want to have counter-signed by you. In case C. & K. refuse to settle within twenty-four hours after the demand made by you, and the said lawyer, publish a notice contained in the copy of the letter to C. & K. above mentioned or such modification thereof as my lawyer shall consider proper to protect my interests, signed
327 by myself and Dorothea Lamb, and to prevent any liability of any kind attaching to me, either past or present, if that be possible. Cowart and Kirkpatrick have broken the partnership agreement, if such it may be called existing between us, in several ways. They have not sent monthly settlements; they have prevented Ables from having access to the books and accounts and they have not allowed him to have any voice in the business. They have given

Mr. Wolfenden an interest as I understand, without any authority, and I believe that you will find that they have in many other ways violated the agreement, I believe that they are running upon an entirely different line from what we started out, and under a name which can in no way involve us here. They have sold territory, as I understand, and taken in payment sheep and lands which they had no right to do. They have bought real estate without right or authority, and with money belonging to the business, for that purpose. One thing I must be premptory about, and that is that the alliance, whether it may be a partnership, or otherwise, must cease. I would rather lose every cent that I have there than to have the matter continue.

This letter is entirely confidential and must not be shown to any one, but the attorney or lawyer whom you shall employ, as per instructions herein contained, and of course you will not reveal the contents of it to any one but said lawyer.

If Cowart and Kirkpatrick have violated the agreement in any way, and have become in any way criminally liable, I shall want to be informed of that fact, and I intend on receipt of such information, —instruct you to have them prosecuted to the full extent of the law.

I must rely upon your loyalty to us here. Your mother and sisters are here, and your interests are here, and I know that I
328 can trust you. You have no obligations to Cowart and Kirkpatrick, and I know that you will not sacrifice any interest of your old Island friends, for C. & K. who are almost entirely strangers. I want the lawyer you may engage just to inform me what my rights are, and those of Miss Lamb and Mr. McStocker, and what liabilities if any, we are subjected to.

Give this letter your prompt attention and let me know by return mail exactly what you have done. I do not expect you to work for nothing, you will have reasonable compensation, as I said before, what you ask of me I will pay.

I remain, as ever,

Your friend, J. ALFRED MAGOON.

Mr. Ables tells me that he has placed his interests in the hands of a lawyer by the name of Connolly. If in your judgment this is a proper lawyer to handle our interests, select him.

J. A. M.

What Mr. Magoon has hereinabove stated refers to my interest as well as his.

DOROTHEA LAMB.

The fact that I hold the formula is a great lever which you can hold over C. & K., for if they don't settle with me the formula is as good to me as it is to them and they can do nothing without it.

J. A. M.

329 DEFENDANTS' EXHIBIT "9."

(Indorsed.)

Filed Oct. 30th, 1903. M. T. Simonton, Clerk.

DEC. 16TH, 1897.

T. E. Cowart and J. H. Kirkpatrick, Hagey Institute, Auckland, N. Z.

FRIENDS COWART AND KIRKPATRICK: Miss Lamb has shown to me the letter which she has written to you and it agrees with my views in this matter so far as it goes.

It is needless for me to attempt to conceal the fact that I am extremely worried over the situation of affairs, and have decided to terminate the relations between us at all costs.

The Hagey Institute which has been formed as I understand has nothing to do with our company which was only for the purpose of establishing and disposing of Institutes and which existed under a different name from that which I see on your bill heads, so I have taken it for granted that the new company is an entirely separate concern.

I believed that you tried to keep me posted as well as you could with reference to my interests until failure to receive by last mail any communication from you, but all that came to me was so indefinite and vague that I could not understand what you were doing. I now must insist upon a termination of our business relations and I shall instruct, by this mail, Mr. R. Dexter unless you settle immediately with me, Miss Lamb and B. F. McStocker, to publish notice in the Auckland papers that you are not authorized in any capacity whatever to represent Miss Lamb or myself or either of us in connection with the Hagey Institute, the Hagey formulas, or any association or company under any name or description whatsoever, formed in connection with the same, either as partners, attorney in fact,
330 or otherwise, and that any partnership that may have existed between us has been dissolved, and that you never had any authority, under any partnership articles or otherwise to create any liability against us or either of us. I shall expect you to make this settlement within twenty-four hours after the receipt of this letter with Mr. Dexter who will be instructed to employ an attorney to represent our interests, or else this notice will be published. In case you make this settlement I shall expect of you to publish a notice that all the business relations heretofore existing between us have been dissolved by mutual consent.

As you know I have the formula here which I have never opened and of which I do not know the contents, upon settlement with us, I will send you this formula sealed up and a guarantee that I do not know the contents of it and that its contents have never been revealed by me to any person.

Hoping that all matters will be immediately arranged without obliging me to sever the relations on my side,

I remain Your friend,

J. ALFRED MAGOON.

331 DEFENDANTS' EXHIBIT "9."

(Indorsed.)

Filed Oct. 30, 1903. M. T. Simonton, Clerk.

DEC. 16TH, 1897.

Messrs. Cowart and Kirkpatrick, Hagey Institute, Auckland, N. Z.

GENTLEMEN: I was very much disappointed in not hearing anything from you by last steamer, after what you had written me in your former letter about taking my interests off my hands, and knowing from a former letter to you that I would be glad to sell out, I hoped to have heard something definite from you last week. Instead of the news that I had expected being received directly from you, I heard through Mr. McStocker, who had the news from L. C. Ables, that the business was not very prosperous, if such be the case I think you certainly should have written either to Mr. Magoon or to myself in order to let one of us know the state of affairs. This was a great surprise to me as from the letters received recently I was quite unprepared for such a statement. I felt not only sorry on our account but also on yours for you must feel the disappointment very keenly. For me it is as you very well know a great loss, as I had had to borrow the money to put in and have been paying interest and hoping all along to get at any rate enough out of the business to repay me for all that, and if I do that, either by selling to some outside person or by having you take my interest off my hands, I shall be satisfied.

As it is I think that now will be a good time to bring the matter to a conclusion and for that reason I would like the Power of Attorney given you by me to be returned to Mr. Magoon, and I hereby cancel the same and request you to return it at the earliest possible opportunity, I do not know that you have been giving any guarantees and it is clearly stated in the Articles of Co-partnership that
332 none such shall be made, I think, however, that it will be best to have a very clear understanding on this point and in case any such have been made I must repudiate such action on your part. Mr. Magoon has been in Court almost ever since the last steamer came in and I have been able to have very little satisfactory conversation with him about the matter, of course he is also much disappointed, I should have been glad to get his advice about the letter but as he is not here to advise me I will say that in case there is any way of doing it I wish to withdraw from the business and have nothing more to do with it as I have already stated and will take the amount of money that I originally put in, namely Twenty-five Hundred Dollars.

You must not think from what I have written that I suppose you have not been working well or doing your best for the work, I feel sure that you have done your utmost, but it was a great disappointment to hear nothing from you by last steamer, and I cannot help thinking from what Ables wrote that it was not an oversight on your

part, and it is not only owing to the fact that I am severing my business relations here, but also partly on that account also that I think it best to take the step above indicated.

Yours truly,

DOROTHEA LAMB.

333 DEFENDANTS' EXHIBIT "10."

(Indorsed.)

Filed Oct. 30th, 1903. M. T. Simonton, Clerk.

OCTOBER 21ST, 1897.

Mr. Ruby A. Dexter, Auckland, New Zealand.

FRIEND RUBY: I enclose you a rather informal power of attorney. I want you to act for Miss Lamb and myself. The matter is very important and I think you had not better sign any papers without submitting them to an attorney for which of course you will be obliged to pay some fee, make your bargain with the Attorney before hand. I do not expect to pay out much in this way. L. C. Ables and Cowart & Kirkpatrick each have a copy of the partnership articles which of course it will be necessary for you to see before you could sign papers. You ought to confer with Ables and try to settle the difficulties. I want the powers of attorney given by Miss Lamb and myself to Cowart & Kirkpatrick cancelled, I don't care so much about their being returned in case the return of the same is impracticable, but they must be cancelled in your presence.

I want you to be sure and see that all monies to which we are entitled are remitted to us by good Bill of Exchange. I cannot give you specific instructions but must leave matters protected.

Your friend,

J. ALFRED MAGOON.

334 DEFENDANTS' EXHIBIT "11."

(Indorsed.)

Filed Oct. 30th, 1903. M. T. Simonton, Clerk.

OCT. 21ST, 1897.

Mr. Ruby A. Dexter, Auckland, New Zealand.

MY DEAR DEXTER: We want you jointly in conjunction with T. E. Cowart and J. H. Kirkpatrick to represent us in all matters connected with the Hagey Gold Cure in New Zealand. The act of one is not to be valid or binding without the written approval of all, and all matters done or performed must be strictly within the scope of the partnership agreement in the premises between T. E. Cowart, J. H. Kirkpatrick, Geo. D. Moore, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb. The power of attorney heretofore

given by myself and Miss Lamb to T. E. Cowart and J. H. Kirkpatrick is hereby revoked and is to be rendered up for cancellation.

All monies coming to us or either of us from the Company are to be forwarded to us by Bill of Exchange on Claus Spreckels and Co. or Bishop and Co. in Honolulu.

Yours truly, J. ALFRED MAGOON.

335 In the Circuit Court, c- First Circuit, Territory of Hawaii.

L. 4464, 16/438.

THOMAS M. HARRISON
vs.
J. ALFRED MAGOON ET AL.

Assumpsit.

Clerk's Minutes.

Dated MONDAY, *Nov. 9th,* 1903.

Before Hon. W. J. Robinson, Third Judge.

E. B. McClanahan, for def'ts; A. G. M. Robertson, for Pl't'ff.

Oct. 26 to Nov. 9 Trial.

Nov. 9. Defendant's motion for a non-suit is granted as to all defendants joining in the motion, viz: J. Alfred Magoon, Frank B. McStocker, L. C. Ables and Dorothea Lamb.

Mr. Robertson notes an exception to the ruling of the Court.

The Court discharges the jury.

Mr. Robertson also notes an exception to the discharging of the jury.

(Sg.) M. T. SIMONTON, *Clerk.*

336 (Title of Court and Cause.)

Assumpsit.

Motion for New Trial.

Now comes the plaintiff in the above entitled cause and moves the Court here to order a new trial of said cause on the following grounds:

1. For errors made by the Court in admitting testimony objected to by plaintiff and duly excepted to.
2. For errors made by the Court in excluding testimony offered by plaintiff and duly excepted to.
3. For granting defendants' motion for a non-suit.
4. For discharging the jury duly empannelled and sworn to try said cause.

This motion is based on the record herein and upon the stenographer's notes of testimony taken at the trial herein.

All pleadings, papers and exhibits filed in the cause are hereby made part of this motion.

T. M. HARRISON,
By His Attorneys, ROBERTSON & WILDER.

Dated November 14, 1903.

Endorsed: Filed November 14, 1903. J. A. Thompson, Clerk.

(Title of Court and Cause.)

Clerk's Minutes.

THURSDAY, *Dec.* 31, 1903.

Afternoon Session.

Present: Hon. W. J. Robinson, Third Judge.

(Sg.) M. T. SIMONTON, *Clerk.*

The Court further orders that the plaintiff have twenty (20) days from and after the denial or other disposition of the motion for a new trial herein in which to prepare and present his Bill of Exceptions herein.

Mr. Derby notes an exception.

Exception allowed by the Court.

337 (Title of Court and Cause.)

Order Dismissing Motion for a New Trial.

Plaintiff's Motion for a New Trial in the above cause having come duly on to be heard and the defendants herein having moved in open court to dismiss said motion for a new trial on the grounds (1) that a motion for a new trial was improper in the case of a decision and judgment of non-suit and (2) that no notice of a motion for a new trial was given by plaintiff at the time of the decision and judgment of nonsuit herein; and argument having been duly had in the premises and briefs having been filed and it appearing to the court that said objections of defendants are well taken and that said motion to dismiss should be granted:

Now, therefore, it is hereby ordered and adjudged that Plaintiff's motion for a new trial herein be and the same is hereby dismissed.

Dated Jan. 16th, 1904.

(Sg.) W. J. ROBINSON,
Third Judge of the Circuit Court
of the First Circuit.

Endorsed: Filed Jan. 16th, 1904. George Lucas, Clerk.

(Title of Court and Cause.)

Stipulation.

Defendants in the above entitled cause agree that plaintiff may have twenty days after the completion of the transcript of the testimony herein in which to file, present and perfect his Bill of Exceptions herein, saving, however, all present rights of defendants to insist that the time for filing said Bill of Exceptions has already expired.

January 19, 1904.

(Sg.) KINNEY, McCLANAHAN & COOPER,
Attorneys for Defendants.

Endorsed: Filed Jan. 20, 1904.

338 TERRITORY OF HAWAII:

In the Circuit Court in and for the First Judicial Circuit, September Term, 1903.

THOMAS MILNER HARRISON, Plaintiff,
vs.
J. A. MAGOON ET ALS., Defendants.

Plaintiff's Bill of Exceptions.

Be it remembered that on the 29th day of October 1903, the foregoing action came on for trial, before the Honorable W. J. Robinson, Third Judge of the said Court, and a jury duly empanelled, examined, accepted and sworn, whereupon the following proceedings were had:—

1. The first witness called on behalf of the Plaintiff was one of the defendants, L. C. Ables, The said witness was examined as to whether George D. Moore was a partner of his in the African, Indian and Pacific Hagey Company, and in answer to the question: "Can you state whether or not George D. Moore received any share of the dividends or profits of the partnership that were divided among the partners?" Answered: "It was receipted for, I don't think by him individually, I think by Mr. Cowert or Kirkpatrick."

Mr. McClanahan, counsel for the Defendants, objected to the said answer as irresponsive to the questions and asked that it be stri-ken out. The Court granted the motion to strike out, to which ruling the plaintiff at the time duly excepted. (See Transcript p. 5.)

2. The said witness was afterwards asked: "And who represented him at Auckland?" answered: "His dividend was receipted if my—
to the best of my memory by either Mr. Cowert or Mr. Kirk-
339 patrick, I wouldn't say who: I have a copy of it in my book."

The said counsel, Mr. McClanahan asked that be stricken out as irresponsive to the question. The Court granted the motion to strike out, to which ruling the Plaintiff at the time duly excepted. (See Transcript, p. 5.)

3. The said witness was afterwards asked: "Without referring to that book Mr. Ables can you state who represented Mr. Moore at Auckland while he was absent?" And answered: "I had no notification or any knowledge from any one only a power of attorney; I don't think that they did but Mr. Cowert or Mr. Wirkpatrick, one or the other, receipted for his dividend."

The said counsel, Mr. McClanahan, said: "I ask that be stricken out as incompetent, irrelevant and immaterial and not responsive to the question, the portion about Mr. Cowart receipting for the dividend." The Court ruled that portion of the answer following the words "I don't think that they did" should be stricken out, to which the Plaintiff at the time duly excepted. (See Transcript, p. 6.)

4. The said witness was afterwards asked: "Will you state those circumstances?" (Referring to the circumstances under which Cowart or Kirkpatrick received money on behalf of the said Moore.) And answered: "As a matter of fact Mr. Cowart received this money or a portion of this money that was dividends; I mean he held the money and stated to me that he had a draft for Mr. Moore and would receipt for his money, either Mr. Cowart or Mr. Kirkpatrick. The witness was then asked: "He had what from Mr. Moore?" And answered: "Either one, a receipt for his dividend, stated to me that they would send the money to him."

The said counsel, Mr. McClanahan asked that the statement of either Cowart or Kirkpatrick be stricken out as hearsay. The Court so ordered, to which at the time the Plaintiff duly excepted.
340 (See transcript, pp. 6, 7.)

5. The said witness was then asked: "Well, did either one or the other purport to have authority to receipt for Moore's dividend?" And answered: "I don't think I questioned the authority, I considered I held the receipt of either one of them and held their receipt for money, and didn't question their authority.

The said counsel, Mr. McClanahan then said: "I object to what the witness considered as an authority. And ask that it be stricken out. The Court so ordered, to which the plaintiff at the time duly excepted. (See Transcript, p. 7.)

6. The said witness was afterwards asked: "Did they have anything to say in regard to the Harrison agreement, did Mr. McStocker have anything to say in regard to the Harrison agreement?" (referring to conversation between Mr. Ables and the other defendants after he returned to Honolulu from Auckland). And answered: "I do not remember that he did." He was then asked: "Or the sheep transaction anything with reference to the sheep transaction at all?" And answered: "I can't call it to mind." He was then asked: "He never returned the dividends, that he received out of the concern did he?"

The said counsel, Mr. McClanahan objected to this as immaterial, The Court sustained this objection, to which the plaintiff at the time duly excepted. (See Transcript, 34, 35.)

7. The said witness was then asked: "You received your share of the dividends that was declared?" And answered: "I did." He was then asked: "And have retained it since?"

The said Mr. McClanahan objected to this as immaterial.

The witness answered: "No it was spent a long time ago." The Court sustained the objection, to which the plaintiff at the time duly excepted. (See Transcript, p. 35.)

341 The said witness was afterwards asked: "With whom was the arrangement for the sale of the New South Wales territory made?"

The said counsel, Mr. McClanahan objected to this question as immaterial. The Court sustained the objection, to which the plaintiff at the time duly excepted. (See Transcript, p. 47, 48.)

Thereafter and in the cross examination of the said defendant, L. C. Ables, counsel for the Defendant asked the following questions, to which objections were raised, by the plaintiff and overruled, to which at the time exceptions were duly taken by the plaintiff.

9. The said witness was asked: "At or about the time of this contract did you know or learn the market value of those sheep or the value of them?" Counsel for the plaintiff objected to this question as irrelevant and immaterial. The Court overruled the objection, to which the plaintiff at the time duly excepted. (See Transcript, p. 53.)

10. The said witness was afterwards asked: "Settling the amount?" (Referring to whether or not he took part in arranging what amount of money should be raised by the Tasmania partnership for starting its business in that colony.) And answered: "Nothing to do with it." The counsel for the plaintiff objected to that as incompetent, irrelevant and immaterial and moved to strike the answer out. The Court denied the motion, to which the plaintiff at the time duly excepted. (See Transcript, p. 58.)

11. The said witness was afterwards asked: "What portion of the 4500 pounds did you receive, actually handling the money?" (Referring to money received from a sale of Hagey rights in New South Wales.) The counsel for the plaintiff objected to the question as irrelevant and immaterial. The Court overruled the objections, to which the plaintiff at the time duly excepted. (See Tran-

342 script, p. 69.)

12. The said witness was afterwards asked: "The contract you signed then was a contract which required Harrison to give it a trial for six months?" (Referring to the contract on which this action is brought.) The counsel for the Plaintiff objected to the question on the ground it was not the best evidence, and moved to strike it out. The Court denied the motion, to which the Plaintiff at the time duly excepted. (See transcript, p. 62.)

13. The said witness was afterwards asked: "Is this, Mr. Ables, one of the letters written by you to Mr. McStocker before you left New Zealand?" And answered: "It looks like, may be two or three. This is my writing, this is all my writing." He was then asked: "Answer the question?" And answered: "Yes." He was then asked: "It that your letter?" And said: "Yes, sir." He was then asked: "One of the letters you wrote to McStocker before you left New Zealand?" And said: "Those are all my letters." He was then asked: "What is that?" And said: "That is my letter." He

was then asked: "To McStocker before you left New Zealand?" And said: "To McStocker." Mr. McClanahan, the counsel for the defendants then said "We offer this in evidence if the Court please for the same purpose that we offered Exhibits 1 and 2." The counsel for the Plaintiff objected to the letter on the ground that it was hearsay. The Court overruled the objection, to which the plaintiff at the time duly excepted. The court ordered that the last mentioned letter be marked Exhibit "3." (See transcript, p. 69.)

14. The counsel for the plaintiff then objected to the portions of said Exhibit "3" that were the letters dated August 31st and October 1st in that they were irrelevant and immaterial and improper cross examination. The Court overruled the objection, to which the plaintiff at the time duly excepted. (See Transcript, p. 70.)

343 15. The said witness was then asked. "Will you please to tell me if that is a letter that you wrote to Mr. McStocker prior to your leaving New Zealand with reference to the partnership business?" And answered: "Yes, sir, that is my letter, dated the 26th November." Mr. McClanahan then offered the letter in evidence. The counsel for the plaintiff objected to the evidence on the ground that it was irrelevant and immaterial, and hearsay, because a communication between Ables and McStocker, and not proper cross examination. The Court overruled the objection, to which the plaintiff at the time duly excepted. The Court then ordered the letter which accompanied a trial balance marked Exhibit "4." (See Transcript p. 69, 70.)

16. The counsel for the plaintiff offered a further objection to the reading of the last mentioned letter on the ground that the trial balance, was a thing as wholly complete in itself and was no part of the letter, that by itself it was wholly complete; that — the trial balance was admissible it did not make the letter admissible, The Court overruled the objection, to which the plaintiff at the time duly excepted. (See Transcript, P. 70.)

Thereafter and in the Re-Direct Examination of the said Defendant, L. C. Ables, counsel for the plaintiff asked the following questions, to which objections were raised, sustained, and exceptions duly taken at the time by the said plaintiff.

17. The said witness was asked: "You have stated that on arriving in Honolulu you did not talk to your copartners about the Harrison agreement because it was closed; did any of your partners refer —did any of your partners refer to the Harrison agreement?"

Mr. McClanahan, the counsel for the defendants, objected to this as improper re-direct examination. The Court sustained the objection, to which the plaintiff at the time duly excepted. (See transcript. p. 77.)

The next witness called on behalf of the plaintiff was one
344 of the defendants, Mrs. Dorathea Emerson, who after her direct examination was cross examined by counsel for the defendants and the following questions asked, to which objections were raised by the plaintiff and overruled, to which at the time exceptions were duly taken by the plaintiff.

18. The said witness was asked: "I call your attention to a sen-

tence in the letter marked Plaintiff's Exhibit "K" reading: 'The letters written to Dexter were calculated to do us great harm.' I will asked you if these are carbon copies of those letters?" The counsel for the plaintiff objected to this as irrelevant and immaterial. The counsel for the defendants then said: "Not carbon copies; I meant letter press copies." The counsel for the plaintiff objected to this as irrelevant and immaterial. The Court overruled the objection, to which at the time the plaintiff duly excepted. (See Transcript p. 88.)

19. The witness was then asked: "Here is another one?" And answered: "These two are certainly letters to Dexter that I remember. I am just looking through this one." The counsel for the defendants then said: "We offer in evidence letter identified by the witness as a typewritten copy of a letter sent to the Dexter referred to in the letter Plaintiff's Exhibit "K" dated September 23rd 1897, addressed to Ruby A. Dexter, Auckland, New Zealand, and signed J. Alfred Magoon and I think it is Dorothea Lamb, yes, Dorothea Lamb." The counsel for the plaintiff objected to the letter on the ground that it was irrelevant and improper it having no relation to any controversy involved in this case, but belonging to matters that were disconnected wholly from this case, on the ground that it was hearsay being a communication between certain defendants in this case and one by the name of Ruby Dexter entirely hearsay as to the plaintiff, he not being a party to it in any way, and it not being brought to his attention in any way. And third, that it was not proper cross examination. The Court overruled the objection,
345 to which the plaintiff at the time duly excepted. The Court then ordered that the letter just offered be received and marked Defendant's Exhibit "5" (See transcript, pp. 88, 89.)

20. The counsel for the Defendants then offered in evidence letter dated September 23rd, 1897, addressed to Ruby Dexter, care Dexter and Crozier, Auckland, New Zealand, signed J. Alfred Magoon, and identified by the witness as being one of the letters referred to in Plaintiff's Exhibit "K." The counsel for the plaintiff objected to the letter being received in evidence on the ground that it was irrelevant and immaterial, in as much as it bore in no way upon any issue *in* involved in this case. Secondly, that it was hearsay as to the plaintiff inasmuch as it was correspondence between one of the defendants and a third party wholly disconnected from any partnership or other transaction in this case; also that it was not proper cross examination. The Court overruled the objection to which the plaintiff at the time duly excepted. The Court ordered that the letter be received in evidence and marked Defendants' Exhibit "6." (See transcript, pp. 89, 90.)

21. The counsel for the defendants then said: "We offer in evidence letter dater September 27th, 1897, addressed to Cowart and Kirkpatrick, signed J. Alfred Magoon and identified by the witness as being an enclosure of the letter just read and offered in evidence and received in evidence." The Court then said: "The letter last read being defendant's Exhibit "6." The Counsel for the plaintiff objected to the admission of this in evidence on the ground that it was irrelevant and inasmuch as it had no bearing upon any issue involved in this case, "as hearsay as to this plaintiff, being a communication

between two persons, for which he had no knowledge and could be in no wise binding upon him; and further that it was not proper cross examination. The Court overruled the objection, to which the plaintiff at the time duly excepted. The Court ordered that
346 the instrument offered and then read in evidence be received and marked Defendants' Exhibit "7." (See transcript, p. 89.)

23. The counsel for the Defendants asked the witness: "Can you identify this as copies of letters stated to have been enclosed in that letter to Ruby Dexter?" Who answered: "Did you asked me if this was enclosed too?"

The witness was then asked: "If you can identify that as the copy of the letter to Cowart and Kirkpatrick which is stated to have been enclosed in a letter which I have just read, to Mr. Dexter?" And answered: "What was the date of that letter?" The counsel for the defendants said "December 16th." The witness replied: "Yes, sir, I can." The counsel for the Defendants then said: "We offer in evidence letter dated December 16th, addressed to—both of them addressed to Messrs.—one addressed to Messrs. Cowart and Kirkpatrick, Hagey Institute, Auckland, New Zealand, and the other to T. E. Cowart and J. H. Kirkpatrick, Hagey Institute, Auckland, New Zealand, signed by J. Alfred Magoon—no, I guess I am mistaken—one is signed by him." The counsel for the plaintiff then objected to the admission of these letters offered in evidence on the ground that they were irrelevant and immaterial and had no bearing upon any issue in this case, and hearsay so far as the plaintiff was concerned; and not proper cross examination. The Court then said: "These are the enclosures alluded to in the letters last read?" The counsel for the Defendants answered: "They are." The Court then overruled the objection, to which the Plaintiff at the time duly excepted. The Court ordered the letters to be received in evidence and marked Defendants' Exhibit "9." (See transcript, pp. 91, 92.)

24. The counsel for defendants afterwards said: "I offer in evidence copy of letter dated October 21st, 1897, addressed to Ruby Dexter, signed J. Alfred Magoon and identified by the witness
347 as being one of the letters referred to in Plaintiff's Exhibit "K." The counsel for the Plaintiff objected to the letter being received in evidence as being irrelevant and immaterial and having no bearing upon any issue in this case, hearsay as far as this plaintiff was concerned and not proper cross examination. The Court overruled the objection, to which the plaintiff at the time duly excepted. The Court order- the letter to be received in evidence and marked Defendants' Exhibit "10". (See transcript, pp. 92, 93.)

25. The counsel for the Defendants afterwards said: "I offer in evidence copy of letter dated October 31st, 1897, addressed to Mr. Ruby A. Dexter and signed J. Alfred Magoon and Dorothea Lamb and identified by the witness as being a letter referred to, written to Dexter, in Plaintiff's Exhibit "K". The Court ordered it to be received in evidence and marked Defendants' Exhibit "11". The counsel for the Plaintiff objected to this being received in evidence. The Court set aside the order until the objection was heard. The counsel for the Plaintiff said: "It is irrelevant and immaterial and it doesn't

relate to any issue in this case. It is hearsay as far as this Plaintiff is concerned and not proper cross examination. The Court overruled the objection, to which the Plaintiff at the time duly excepted. (See transcript, p. 93.)

Thereafter in the re-direct examination of the said witness, the counsel for the Plaintiff asked the following questions to which objections were raised, sustained, and exceptions duly taken.

26. The said witness was asked: "When did you think this sheep transaction was entered into with?" The counsel for the defendants' objected to the question. The Court sustained the objection, to which the Plaintiff at the time duly excepted. (See transcript, p. 95.)

348 Thereafter in Re-Cross Examination of the said witness the following questions were asked by counsel for the Defendants; to which objections were raised and overruled, to which the plaintiff at the time duly excepted.

27. The said witness was asked: "Mrs. Emerson you say that those letters were the steps taken by you in the sheep matter; didn't you take another step in connection with Mr. Magoon to send some one down there?" The counsel for the plaintiff objected to this as irrelevant and immaterial and not proper re-cross examination. The Court overruled the objection, to which the Plaintiff at the time duly excepted. (See transcript, P. 97.)

28. The witness was afterwards asked: "Did you not send some one down there or make arrangements to send some one down there to represent you, to cancel and straighten out matters, a man named Good?" The counsel for the plaintiff objected to this as irrelevant and immaterial and hearsay. The Court over-uled the objection to which the Plaintiff at the time duly excepted. (See transcript pp. 97, 98.)

Thereafter the first witness, Mr. L. C. Ables was recalled for further direct examination, and asked the following questions, to which objections were raised, sustained, and exceptions duly taken at the time by the Plaintiff.

29. The witness was asked: "Did you account for it in your evidence on the last trial?" (Referring to a discrepancy in the testimony of the witness between what was given at this trial and that given at the trial before, concerning the date of Moore's departure from New Zealand.) The counsel for the defendants objected to the question as an effort to impeach the witness. The Court sustained the objection to which the Plaintiff at the time duly excepted. (See transcript p. 101.)

349 Thereafter the counsel for the plaintiff read the deposition of Alfred Edward Gilmore, to which the following objections were raised, sustained, and exceptions at the time duly taken by the Plaintiff.

30. On the answer to question 34 being read Mr. McClanahan, counsel for the defendants, made the following motion: "I ask that that be stricken out because it is based on the answer which has been stricken out. The Court ordered it stricken out, to which the Plaintiff at the time duly excepted. (See transcript, p. 102.)

31. After question 35, and answer to wit. "Did you mention the

matter to Harrison?" "Yes, Sir." were read, the counsel for the defendants objected to that and asked that it be stricken out. The Court so ordered, to which at the time the plaintiff duly excepted. (See transcript, p. 102.)

32. After question 36, and answer, to wit: "If so when?" "On several occasions" were read, the counsel for the defendants objected to it and asked that it be stricken out. The Court granted the motion, to which the plaintiff at the time duly excepted. (See transcript, pp. 102, 103.)

33. The counsel for the defendants objected to question 52 as being immaterial. The Court sustained the objection, to which the plaintiff at the time duly excepted. (See transcript p. 103.)

34. The counsel for the Defendants objected to question 53 as immaterial. The Court sustained the objection, to which the Plaintiff duly excepted. (See transcript, p. 103.)

35. The counsel for the Defendants objected to question 54 as being immaterial and based on the last question dissallowed, which was the said question 53. The Court sustained the objection to which the Plaintiff at the time duly excepted. (See transcript, p. 103.)

350 36. The counsel for the defendants objected to question 56 as calling for the conclusion of the witness. The Court sustained the objection, to which the Plaintiff at the time duly excepted. (See Transcript, p. 103.)

37. The counsel for the defendants objected to question 57 as immaterial and calling for the conclusion of the witness. The Court sustained the objection, to which the Plaintiff at the time duly excepted. (See transcript, p. 103.)

38. The counsel for the Defendants objected to question 58 as being based on the question that had been ruled out. The Court sustained the objection, to which the Plaintiff at the time duly excepted. (See transcript, 103.)

39. The counsel for the Defendants objected to question 59 as immaterial. The Court sustained the objection, to which the Plaintiff at the time duly excepted. (pp. 103, 104.)

Thereafter the Plaintiff, T. M. Harrison, was called as witness on his own behalf, and was asked by his counsel the following question, to which objections were raised, sustained, and exceptions at the time duly taken by the Plaintiff as appears below:

40. The said witness was asked: "State whether or not you became dissatisfied with the business by reason of these written instructions?" (Referring to instructions for conducting the Hagey Cure.) Ultimately the witness answered: "I was dissatisfied." The Court sustained the objection, to which the Plaintiff at the time duly excepted. (See transcript, pp. 112, 113.)

41. The said witness was asked: "Tell us in further detail if you can what you did with reference to the business in Hobart?" And answered: "We didn't succeed in getting any patients, and there was some trouble arose between Gilmore and I and O'Brien, we
351 believed that he was holding patients back from certain things he said." The counsel for the Defendants asked that the

conclusion and reason be stricken —. The Court ordered that all the words following "We believed" be stricken out, to which the Plaintiff at the time duly excepted. (See transcript, p. 117.)

42. The said witness was asked: "Did you leave anything undone that you might have done to make the Institute a success?" And answered: "No, I was very anxious—"The counsel for the Defendants objected to this as incompetent, irrelevant and immaterial. The Court sustained the objection to which the Plaintiff at the time duly excepted. (See transcript, pp. 118, 119.)

43. The witness was then asked: "Did you fail to do anything that was usually done in connection with starting a Hagey Institute?" The counsel for the Defendants here said: "Same objections. Calling for the opinion of the witness. "The Court sustained the objection, to which at the time the Plaintiff duly excepted. (See transcript, p. 119.)

44. The witness was afterwards asked: "From when to when?" (Referring to the period the Hagey Institute at Hobart was kept open by him.) And answered: "From the 1st of February to the 1st of March. I was very much afraid of being accused of bad faith and I did my utmost to get the institute started." "The counsel for the defendants asked that it be stricken out as irresponsive. The Court ordered it to be stricken out from the words "I was very much afraid," to which the Plaintiff at the time duly excepted. (See transcript, p. 119.)

45. The witness was afterwards asked: "Was it possible to continue the Institute any longer?" The counsel for the defendants objected to that as calling for the opinion of the witness. The Court sustained the objection, to which the plaintiff at the time duly excepted.
352 (See transcript, p. 120.)

46. The witness was then asked: "Could you carry on the business any longer?" Counsel for the defendants objected to this on the same grounds. The Court sustained the objection, to which the plaintiff at the time duly excepted. (See transcript, p. 121.)

47. The witness was then asked: "Could the business have been maintained any longer?" The counsel for the defendants, objected to this on the same grounds. The Court sustained the objection, to which the plaintiff at the time duly excepted. (See transcript p. 121.)

48. The witness was afterwards asked: "Under what provision in the contract, if any, did you make this demand on Cowart or Kirkpatrick?" And answered: "Under clause "4." The counsel for the defendants objected, because the contract spoke for itself. The Court sustained the objection, to which the plaintiff at the time duly excepted. (See transcript, p. 123.)

49. The witness was afterwards asked: "In what capacity did you make demand upon him?" (Referring to Kirkpatrick.) The counsel for the defendants objected to this as immaterial and calling for the conclusion of the witness. The Court sustained the objection to which the plaintiff at the time duly excepted. (See transcript, p. 124.)

50. The witness was afterwards asked: "Did you know where he

was?" The counsel for the defendant objected to this as immaterial. The Court sustained the objection, to which the plaintiff at the time duly excepted. (See transcript, p. 125.)

51. The witness was afterwards asked: "What was the value of the sheep run and sheep that you turned over to the company as the consideration on your part for this agreement?" The counsel
353 for the defendants objected to the question on the ground that the witness was not shown to be qualified to testify as to the value. The Court sustained the objection, to which the plaintiff at the time duly excepted. (See transcript, p. 127.)

Thereafter in the Re-Direct examination of the said plaintiff, T. M. Harrison, the counsel for the plaintiff asked the following question, to which objections were raised, sustained, and exceptions taken as below stated:

Thereafter in the Re-Cross examination of the said plaintiff, T. M. Harrison, the counsel for the defendants asked the following question, which was objected to and the objections overruled, to which the plaintiff at the time duly excepted, as below:

53. The said witness was asked: "Was not Robinson indebted to you, after you bought in he became indebted to you?" And answered: "Yes." He was then asked: "Why and how?" and the counsel for the plaintiff objected to this as not proper cross examination. The Court overruled the objection, to which the plaintiff at the time duly excepted. (See transcript, p. 184.)

54. Thereafter the counsel for the defendants moved the Court as follows: "If the Court please, we move for judgment of nonsuit on the defendant Magoon on the ground that there has been shown no notice of dissatisfaction as required by the contract and no demand; on the ground that the contract is unauthorized; on the ground that there has been shown no ratification on the ground that the evidence clearly shows that the dissatisfaction arose before the plaintiff entered into the conduct of the business and was therefore not *bona fida*; on the ground that there was no consideration for the contract sued on; on the ground that there was shown in the evidence a judgment in the New Zealand Court that remains unsatified and that it bars this action.

354 We make the same motion on the same grounds for the defendant Emerson.

We make the same motion on the same grounds for the defendant McStocker.

For the defendant Magoon we further move for a nonsuit on the following grounds viewing the contract as joint and several:

First. Because the contract is beyond the scope of the partnership business and unauthorized:

Second. Because there has been no ratification shown within the rules of law as a ratification of an unauthorized contract:

Third. Even if ratification of some of the parties be shown, there is no ratification on the part of all, and as a contract could not be authorized by less than all, it cannot be ratified by less than all:

Fourth. On the ground that judgment has been had against some

of the joint contractors that bars this suit against all or against the remaining ones:

Fifth. The contract is without consideration, the contract sued on:

Sixth. There is no signature of the firm to the contract sued on because all the members of the partnership did not sign.

Seventh. There is no proof of any *bona fida* dissatisfaction on the part of Harrison:

Eighth. There is no proof of any notice of any dissatisfaction to or demand on the defendant Magoon or the defendant McStocker or defendant Emerson, or any of them:

We make this motion on the same grounds viewing the contract as joint for the defendant Emerson and the defendant McStocker.

Viewing the contract as a several contract we move on behalf
355 of defendant Magoon for a nonsuit on the ground that no authority is shown to bind Magoon, McStocker or Emerson or any of them:

Second. That no ratification has been shown by them or any of them:

Third. That no proof of any *bona fide* dissatisfaction on the part of Harrison has been shown:

Fourth. That there is no proof of notice to or demand on Magoon, McStocker or Emerson or any of them, and it is necessary to give notice and make demand on each.

Fifth. On the ground that no consideration passed to the several obligors.

We make the same motion on behalf of the defendant Emerson, on the same grounds, and on behalf of the defendant McStocker on the same grounds.

We move for a nonsuit on behalf of defendant Ables:

First. On the ground that there is no contract by Ables with the others and intent on either his part or Harrison that he should be bound if the others were not:

Second. The form of the action is unsuited to the plaintiff's claim since Ables cannot be bound severally on the contract:

Third. The contract was made by the Company and cannot bind Ables individually:

Fourth. If it be held that the contract can bind Ables individually it is a several contract, and there is no proof furnished of any notice of dissatisfaction to Ables and consequently no demand upon Ables:

Fifth. If assuming a contract to be held to be a joint on- on the part of Ables and certain of the other defendants, the New Zealand judgment bars this action against Ables:

Sixth. There is no proof of any *bona fide* dissatisfaction
356 on the part of Harrison:

Seventh. There is a misjoinder of parties defendant:

Eighth. There is no consideration passing to Ables:

Ninth. The New Zealand judgment bars this action against Ables.

The Court granted the motion for non-suit, as to the defendants Magoon, McStocker, Emerson and Ables, to which the Plaintiff at the time duly excepted. (See transcript pp. 187, 188, 189, 190.)

55. Thereafter on the 9th day of November, 1903, the Court address the jury as follows: "Gentlemen, at this stage of the case the Court having determined that the plaintiff cannot maintain this action as against the defendants, which have been served or who have appeared in this action, and who are now represented in Court, there is nothing in this case to be left to the determination of the jury. You are therefore discharged with the thanks of this Court for your service in this cause." Upon this happening, the Plaintiff at the time duly noted an exception to the discharge of the jury. (See Transcript, p. 190.)

56. That thereafter on the 14th day of November 1903, the Plaintiff in the above entitled case filed his motion for a new trial, which was in the words following, to wit:

357 In the Circuit Court of the First Circuit, Territory of Hawaii, September Term, 1903.

T. M. HARRISON
vs.
J. A. MAGOON ET ALS.

Assumpsit.

Motion for New Trial.

Now comes the Plaintiff in the above entitled cause and moves the Court here to order a new trial of said cause on the following grounds:

1. For errors made by the Court in admitting testimony objected to by Plaintiff and duly excepted to.
2. For errors made by the Court in excluding testimony offered by Plaintiff and duly excepted to.
3. For granting defendants' motion for a non-suit.
4. For discharging the jury duly empannelled and sworn to try said cause.

This motion is based on the record herein and upon the stenographer's notes of testimony taken at the trial herein.

All pleadings, papers and exhibits filed in the cause are hereby made part of this motion.

T. M. HARRISON,
(Sg.) By His Attorneys, ROBERTSON & WILDER.

Dated November 14th, 1903.

That said Motion for a New Trial came regularly for hearing on the 31st day of December 1903, and was from time to time adjourned for further hearing until the 16th day of January 1904, when it was overruled by the Court, as follows, to wit:

358 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

T. M. HARRISON, Plaintiff,
vs.
J. A. MAGOON ET ALS., Defendants.

Assumpsit.

Order Dismissing Motion for a New Trial.

Plaintiff's Motion for a New Trial in the above cause having come duly on to be heard and the defendants herein having moved in open court to dismiss said motion for a new trial on the grounds (1) that a motion for a new trial was improper in the case of a discision and judgment of non-suit and (2) that no notice of a motion for a new trial was given by plaintiff at the time of the decision and judgment of nonsuit herein: and argument having been duly had in the premises and briefs having been filed and it appearsing to the court that said objections of defendants are well taken and that said motion to dismiss should be granted:

Now, therefore, it is hereby ordered and adjudged that Plaintiff's motion for a new trial herein be and the same is hereby dismissed.

Dated, Jan. 16th, 1904.

(Sg.) W. J. ROBINSON.
Third Judge of the Circuit Court of the First Circuit.

To the said order dismissing motion for a new trial, the Plaintiff at the time duly excepted.

359 It is hereby certified that the papers referred to, in the Official Stenographer's shorthand transcript of testimony given in this action, on page 87 thereof, as ordered by the Court to be received in evidence and marked Plaintiff's Exhibit "M," are the same papers referred to at two other places in the said transcript, to wit:

1. At pages 40 and 41 thereof in the following question and answer, to wit: "Q. Please examine this? A. This looks like the paper but I think Mott-Smith as attorney had something to do with it, I think his name is on the paper; this looks like it.

2. At page 186 thereof in the following admission, to wit: "Mr. Robertson: I understand that it is admitted on the part of the defendants that Mr. Magoon and Mr. Ables and Mr. McStocker as well as Mrs. Emerson, was served by Mr. Mott-Smith with a copy of this New Zealand Summons on or about 23rd of July 1898. Is that so Mr. McClanahan?

All records, pleadings, motions, affidavits, exhibits, instructions to the jury, clerk's minutes and the official stenographer's shorthand transcript of testimony had in said case, and each and every paper on file in said case, are hereby made a part of this Bill of Exceptions.

(Sg.) ROBERTSON & WILDER,
Attorneys for the Plaintiff.

The foregoing Bill of Exceptions being found conformable to the truth is hereby allowed, and I hereby certify that the record contains all the pleadings, exhibits and testimony necessary for a proper consideration of said case in the Supreme Court.

(Sg.) W. B. ROBINSON,
Third Judge, First Circuit, Territory of Hawaii.

Dated, Honolulu, H. T. 20th August A. D. 1904.

Endorsed: Filed and presented for allowance Aug. 6, 1904 at 10.58 A. M. George Lucas, Clerk.

360 In the Supreme Court of the Territory of Hawaii.

THOMAS M. HARRISON
vs.
J. A. MAGOON ET AL.

Motion to Strike Cause from Calendar and Dismiss Exceptions.

Now come the defendants herein, by their attorneys Kinney, McClanahan & Cooper and move this Honorable Court that the above cause be stricken from the calendar and that plaintiff's bill of exceptions herein be dismissed and for such other relief as to this Court may seem appropriate.

This motion is based on the record and upon the following grounds:

1. That the aforesaid bill of exceptions of the plaintiff herein was not filed within the time allowed by law.
2. That no exception lies to the order herein dismissing plaintiff's motion for a new trial.
3. That no motion for a new trial lies after an order and judgment of nonsuit.
4. That no notice of a motion for a new trial was given at the time that the order of nonsuit was made in the above cause nor at any proper time.

Dated Honolulu, September 2nd, A. D. 1904.

KINNEY, McCLANAHAN & COOPER,
Attorneys for the Defendants.

Endorsed and Filed, September 2, 1904.

361 Supreme Court of the Territory of Hawaii, October Term, 1904.

T. M. HARRISON
vs.
J. A. MAGOON ET AL.

HONOLULU, *Monday, October 3rd,* 1904.

Clerk's Minutes.

Exceptions from Circuit Court 1st Circuit.
Motion to Dismiss.
Before Frear C. J. Hartwell and Hatch JJ.
Robertson and Wilder appeared for the Plaintiff and Kinney McClanahan & Cooper, S. H. Derby Magoon & Lightfoot for the Defendant-
Mr. Derby reads a motion to dismiss Bill of Exceptions and argues.
Mr. Magoon argues.
Mr. Robertson argues.
Mr. Harrison argues.
Mr. Derby replies.
The Court takes the matter under consideration.

362 THOMAS M. HARRISON
v.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, and DOROTHEA EMERSON.

Exceptions from Circuit Court, First Circuit.

Argued October 3, 1904. Decided October 31, 1904.

Frear, C. J., Hartwell and Hatch, JJ.

BILL OF EXCEPTIONS—*extension of time for.*—Under C. L. Sec. 1438, as amended by Laws of 1903, Act 32, Sec. 18, an extension of time in which to file a bill of exceptions must be allowed before the expiration of the twenty days allowed by statute or the extended time previously allowed by the judge under the statute.

ID.—*time for, in case of motion for new trial.*—The date when such twenty days begins in the case of an exception to a ruling on a motion for a new trial is the date of such ruling and not the date of the judgment entered in the case before the motion was made.

EXCEPTION—*to dismissal of motion for new trial.*—An exception lies to a dismissal, as distinguished from a denial or overruling, of a motion for a new trial. The remedy, if any, by mandamus, is not exclusive.

MOTION—*for new trial proper in case of involuntary nonsuit.*—A motion for a new trial lies for errors committed during the trial, including an error in ordering a nonsuit, although the exceptions to the rulings alleged to be erroneous
363 may be brought directly to this court by bill of exceptions, without first being made the basis of a motion for a new trial.

MOTION FOR NEW TRIAL—*notice of.*—C. L. Secs. 1462, 1463, do not make the right to move for a new trial on grounds other than that the verdict is contrary to the law and the evidence, conditional upon giving notice of the motion at the time of rendering the verdict or judgment.

Opinion of the Court by FREAR, *C. J.*:

The only question presented in this case is whether the defendant's motion to strike the cause from the calendar and dismiss the plaintiff's bill of exceptions should be granted. The circumstances are these: On November 9, 1903, at the close of the trial in the circuit court, a nonsuit was ordered on defendants' motion. On November 12, 1903, judgment was entered. On November 14, 1903, a motion for a new trial was filed based on four grounds, namely, errors in admitting testimony, errors in excluding testimony, error in granting defendants' motion for a nonsuit, and error in discharging the jury. On December 31, 1903, time for filing a bill of exceptions was extended until ten days after the disposition of the motion for a new trial. On January 15, 1904, the motion for a new trial was dismissed, and the time for filing a bill of exceptions was further extended until twenty days after completion of the transcript. The bill of exceptions was filed August 6, 1904, within the time allowed.

The grounds of the motion to dismiss the bill of exceptions will be considered in their order.

1. That the bill of exceptions was not filed within the time allowed by law. The statute (C. L., Sec. 1438, as amended by Laws of 1903, Act 32, Sec. 18,) requires the exceptions to be incorporated in a bill of exceptions and presented to the judge "within twenty days after final judgment or such further time as may be allowed by the judge." It is obvious that this provision was not complied with, if the date of the final judgment must be considered as November 12, 1903, the day on which judgment
364 was entered; for an allowance of further time, when made after the expiration of the twenty days after judgment or the extended time, if any, properly allowed previously, is ineffectual. Kapiolani Est., Ltd., *v.* Peck, 14 Haw. 580.

It will be unnecessary to decide at present whether the filing of the motion for a new trial suspended the judgment until the disposition of the motion, so as to allow the fifty-five exceptions, including the exception to the order of nonsuit, which were taken during the trial and before the entry of judgment, to be incorporated in a bill of exceptions and presented to the judge within twenty days or further granted time thereafter; for, if the remaining exception,

namely, that to the dismissal of the motion for a new trial, was properly incorporated in the bill and presented to the judge within the time allowed by law, the bill of exceptions can not be dismissed. In our opinion, that exception was incorporated in the bill and presented within the time allowed by law.

The section of the statute above cited, construed in connection with Sec. 1436 of the Civil Laws, permits exceptions taken in any "proceeding," as well as in any "trial" before a circuit court, to be incorporated in a bill of exceptions within the time limited. In the nature of things an exception could not be taken to the dismissal of a motion for a new trial within twenty days after judgment, when such dismissal was not made until after that time, and it would hardly be expected that a party should be obliged to obtain an extension of time before the ruling excepted to is made. If the motion for a new trial was properly made and ruled upon, an exception would, by the terms of the statute, lie to the ruling whenever it was made. Under the circumstances the reasonable view would seem to be to consider the motion for a new trial as a "proceeding," and not as a part of the "trial," and the judgment in that proceeding as the decision therein, rather than the judgment entered previously after the trial and before the motion for a new trial was filed. In that view the bill of exceptions, in so far as the exception to the dismissal of the motion for a new trial is concerned, was made up and presented to the judge within the time limited, for the
365 extension of time was obtained within twenty days after the decision upon that motion.

2. That no exception lies to an order dismissing a motion for a new trial,—the contention being that mandamus to compel the judge to rule upon the motion, and not an exception to a dismissal of the motion, is the proper remedy where, as in this instance, the motion was dismissed and not overruled. It seems to us that whether mandamus would lie or not, an exception does lie; for the dismissal of the motion was an opinion, ruling or order within the meaning of the first portion of the section of the statute first above referred to, which provides that "a party may allege exceptions to any such opinion, direction, instruction, ruling or order," that is, "in any trial or other proceeding before a circuit court * * * in any matter of law," as shown by the preceding two sections in the Civil Laws.

3. That no motion for a new trial lies after an order or judgment of nonsuit. This ground also can not be sustained. In the absence of statute a motion for a new trial would lie in such a case, and generally elsewhere as well as here motions for new trials have been based upon rulings made and excepted to during the trial, as well as upon the ground that the verdict was contrary to the law and the evidence or upon the grounds of newly discovered evidence, misconduct of the jury, and the like. The ruling upon the motion for a nonsuit was such a ruling made during the trial. The mere fact that an exception to an order of nonsuit may be incorporated in a bill of exceptions and brought directly to this court, without first being made the basis of a motion for a new trial, does not prevent

its being made the basis of a motion for a new trial. That is true also of other exceptions taken during the trial. It may usually be preferable to bring such exceptions directly to this court, but that method is not exclusive.

4. That no notice of a motion for a new trial was given at the time that the order of nonsuit was made. If such notice was necessary, it must have been by reason of some statutory provision. The rule of the circuit courts, adopted in 1893, if it
366 is still in force, required merely that notice of a motion for a new trial based on the ground that the verdict was contrary to the law and the evidence should be made at the time of the rendition of the verdict and before the jury was discharged. That has no application to a motion for a new trial based on errors of law committed by the trial judge during the course of a trial.

The statutory provisions that bear upon this question are those set forth in Secs. 1462 and 1463 of the Civil Laws, which read as follows:

"SEC. 1462. Judgment shall be entered by the clerk, without motion, immediately upon the rendition of a verdict, or of a judgment of the court in banco, or of a judge at chambers, and execution may issue thereon at any time thereafter, when called for, unless notice is given at the time of rendering the verdict or judgment, of a motion for a new trial and the filing of a bill of exceptions and bond, as provided by statute, within ten days after the rendition of such verdict or judgment: provided, that execution may issue within ten days, even though such notice be given, when good and sufficient cause can be shown therefor. The provisions of this section shall not affect the right of appeal."

"SEC. 1463. Any party against whom a verdict or judgment is rendered, as set forth in the last preceding section, may, upon filing a sufficient bond of security, conditioned for the payment of all costs of motion in case he fail to sustain the same, and that he will not to the detriment of the plaintiff in the action, remove or otherwise dispose of any property he may have liable to execution on such judgment, and upon giving notice of said motion and the grounds thereof to the opposite party, move the court at any time within ten days after rendition of verdict or judgment, for a new trial, for any cause for which by law a new trial may and ought to be granted. The filing of the bill of exceptions and bond shall operate as a stay of execution, until the motion is determined."

If these sections are taken just as they stand, they have no application to the present case, for a judgment of nonsuit by a circuit court presided over by one judge is not "a verdict, or a judgment of the court in banco, or of a judge at chambers." In such
367 case there would be no statutory limitation of time within which to give notice of a motion for a new trial, or even within which to make the motion; but in our opinion the words "in banco" have been repealed by implication by acts which have wrought sweeping changes in the Hawaiian judiciary since the enactment of these sections as Secs. 1155 and 1156 of the Civil Code of 1859, which were taken with extensive modifications from the Act of 1847,

organizing the judiciary department. There is no longer a circuit court in banco or a Supreme Court sitting in banco for the trial of cases at *nisi prius*. The circuit courts take the place in general of the former supreme court at *nisi prius*. See Republic *v.* Tokuji, 9 Haw. 548, 550.

With the words "in banco" omitted, these sections apply to the present case, unless, indeed, they are confined in their operation to motions for new trials when made by defendants, in which case also there would be no statutory limitation of the time within which notice of a motion for a new trial would have to be given or within which the motion would have to be made by the plaintiff in this case. But there does not seem to be adequate reason for holding that these sections apply to defendants alone. There is no reason why they should be so limited and we believe it has not generally been supposed that they were. Their language, it is true, is framed to some extent as if motions by defendants were particularly in mind, but that was not unnatural, considering that defendants are usually the ones who make such motions. The fact that one of the conditions required in the bond by the second of these sections is that the moving party will not to the "detriment of the plaintiff" remove or dispose of his property does not by necessary implication limit the operation of the section to motions by defendants. That condition is required only when it is applicable. Not being applicable to a plaintiff, it is not required of him. It, indeed, does not apply even to defendants when it is not applicable to them, as in the case of a judgment against a defendant in ejectment for possession without damages. This has already been held. Kaheana *v.* Nalimu, 8 Haw. 227, Kaniku *v.* Monsarrat, *id.* 229. See also The
368 Queen *v.* Gay, *id.* 468, for somewhat similar reasoning under a different statute.

But do these sections, if applicable, require notice of a motion for a new trial to be given at the time of rendering a judgment of nonsuit? It must be confessed that they present several questions of difficulty, and they seem to be much in need of amendment, but taken together they do not, in our opinion, require notice of a motion for a new trial to be given at the time of rendering a judgment of nonsuit. The second of these sections relates primarily to motions for a new trial. It seems to be complete in itself. It affirmatively states that a motion for a new trial may be made upon certain conditions for any cause for which by law a new trial may and ought to be granted, and among those conditions there is no requirement that notice of the motion should be given at the time of rendering the judgment. The words "as set forth in the last preceding section" refer to the classes of judgments enumerated in the preceding section, and not to the other provisions of that section. That (the preceding) section relates primarily to the entry of judgment and the issue and stay of execution. The requirement that notice of a motion for a new trial should be given at the time of rendering the verdict or judgment is set forth merely as a condition of staying execution, and not as a condition of making a motion for a new trial. Whether such notice is necessary for the

purpose of staying execution, in view of the last sentence of the second of these sections, need not be determined. The reason, if any, for holding that these sections are inseparable in this respect, is that unless a motion for a new trial would suspend the judgment it would be useless to make it, or, to put it in another way, that, if execution may issue under the first of these sections unless notice of the motion is given at the time of the judgment, it would be futile to make the motion unless such notice were given. But this reason would apply with equal force to prevent the case from being taken to the Supreme Court on exceptions or writ of error for errors made during the trial, because, if execution may
369 issue at once unless notice of a motion for a new trial is given, it may issue notwithstanding the allowance of a bill of exceptions or the issuance of a writ of error when no motion for a new trial is made or notice thereof given. If it is replied that the statutes on writs of error and bills of exceptions contain provisions for a stay of execution, it may be rejoined that the second of the sections now in question likewise contains such a provision—not to mention the provisions of Section 1481 in the same chapter. As already intimated, the construction of these sections is not free from difficulty, and the fact that they were not drawn, as is evident, with due regard for harmony between them or for all the circumstances that might arise calling for their application, justifies a more liberal construction with a view to carrying out the general intent.

The chief difficulty in the way of this construction is that the court, only two of its members sitting, in Kekaua *v.* Kalei, 3 Haw. 683, held that notice of a motion for a new trial, based on the ground that the verdict was contrary to the law and the evidence, should have been given reasonably soon after the verdict, and was too late when made on the following day. That decision was undoubtedly correct under the rule of court then in force and referred to by the court, that an exception to a verdict must be taken at the time the verdict is rendered, for the exception was not taken, as well as the notice not given, until the next day, but the court based its opinion chiefly upon the ground that the notice was not given and that it was required by the first of the two sections of the statute above quoted. The decision is brief, and does not refer to the second of the sections above quoted, and it does not appear with what degree of care the question was considered. In so far as it was based on the statute, it does not commend itself to us, but it will be sufficient without reversing it to decline to extend it beyond the facts of that case. In the present case there is no rule of court in force similar to that then in force, and in this case the motion for a new trial is not, as it was in that case, based on the ground that the verdict was contrary to the law and the evidence. We believe that it has been the common practice here to include among the grounds of a motion for a new
370 trial errors of law committed during the trial, as well as the inconsistency between the verdict and the law and the evidence, and without giving notice at the time of rendering the verdict that the motion would be based upon those grounds. Moreover, the statutory provisions in question can not be held to apply in all cases

of motions for a new trial, in so far as giving notice of the motion at the time of rendering the verdict is concerned; as, for example, when the motion is based upon matters arising subsequently to the verdict or judgment, such as newly discovered evidence, misconduct of the jury, etc. Rules of court also have required notice to be given only when the motion was based on the ground that the verdict was contrary to the law and the evidence.

Whether the fifty-five exceptions, or any of them, taken to the order of nonsuit and to the discharge of the jury, which were specifically made grounds of the motion for a new trial, may be considered ultimately, not as independent exceptions set forth in the bill, but incidentally in considering the exception to the dismissal of the motion for a new trial, or an exception to the denial of that motion in the event that the case should be remanded to the circuit judge for a ruling upon the motion, inasmuch as that motion was based in part upon errors not specifically enumerated therein occurring during the trial, we need not say at the present time; nor need we say now whether we can consider the question whether the motion for a new trial should have been overruled. In our opinion, the plaintiff was in order in making the motion for a new trial, in excepting to the dismissal of that motion, and in bringing that exception here in a bill of exceptions.

The motion to strike from the calendar and dismiss the bill of exceptions is denied.

Plaintiff in person; Robertson & Wilder with him.

Defendant Magoon in person; Kinney, McClanahan & Cooper and S. H. Derby with him.

(S'g.) W. F. FREAR.
(S'g.) F. M. HATCH.

371 HARTWELL, *J.*:

I agree that the bill of exceptions can not be dismissed, and that we must consider the exception to the dismissad of the plaintiff's motion for a new trial, which in effect was a denial of the motion. I also concur in the opinion that no notice of the motion was required to be given at the time of the nonsuit; that it remains to be considered whether this court, in deciding upon the legality of refusing the motion for a new trial, can consider all the rulings during the trial to which exceptions were taken. My impression is that the general reference in the motion to errors during the trial is insufficient to bring them before the court as questions of law; but that is for future consideration after hearing argument.

But I think that the power of the circuit courts to grant new trials in cases of nonsuit is found in the common law of Hawaii, and not in its statute, Sec. 1463 C. L., which appears to me to provide for a new trial on the motion of a defendant only. The prerequisite of the motion there authorized is "upon filing a sufficient bond of security, conditioned for the payment of all costs of motion in case he fail to sustain the same, and that he will not to the detriment of the plaintiff in the action, remove or otherwise dispose of any property he may have liable to execution on such judgment, and upon

giving notice of said motion and the grounds thereof to the opposite party." *Ib.*

It is also difficult, I find, to regard the new trials named in that section as distinct from the new trials in the cases contemplated by the previous section, namely, "immediately upon the rendition of a verdict or of a judgment of the court in banco, or of a judge at chambers," which requires immediate entry of judgment, and also that execution issue thereon, "unless notice is given at the time of rendering the verdict or judgment of a motion for a new trial, and the filing of a bill of exceptions and bond as provided by statute within ten days after rendition of such verdict or judgment."

372 The power of the circuit courts at *nisi prius* to grant new trials of civil causes in certain cases not provided for by statute has been so long recognized by this court as to become common law of Hawaii. The practice has long been well settled that not only a defendant but a plaintiff may obtain a new trial, and that either party may do so upon the discovery of new evidence, or of misconduct of the jury too late to give notice of such motion at the time of the rendition of the verdict or judgment. Perhaps the limit of time for such motions, when not otherwise provided by rules, would be the term within which a court has inherent power to vacate its own judgments.

By English common law as regulated, if not declared by early statute of William IV. and George IV., a practice was established of taking out a rule during the term of four days thereafter to show cause why a new trial should not be granted, and this practice included cases of nonsuit. Whitley *v.* Roberts, 1 Exchequer (McC. & Y.) 109, Note A; Great Northern Ry. *v.* Mossop, 17 Com. Bench 134; Lloyd *v.* Berkovitz, 16 M. & W. 30; Plumley *v.* Isherwood, 12 M. & W. 189.

Except as herein modified, I concur in the opinion of the court.

(S'g.) ALFRED S. HARTWELL.

373 Supreme Court of the Territory of Hawaii, October Term, 1904.

T. M. HARRISON
v.
J. A. MAGOON ET AL.

HONOLULU, MONDAY, *December 5th*, 1904.

Clerk's Minutes.

Exceptions from Circuit Court, First Circuit.

Before Frear, C. J. Hartwell and Hatch, J.J.

Robertson and Wilder, T. M. Harrison appeared for the Plaintiff and Kinney, McClanahan & Cooper and S. H. Derby for the defendants.

Mr. Robertson makes a statement of the case and argues.

Mr. Harrison argues.

At 4.12 P. M. the Court adjourns for the day.

TUESDAY, *December* 6, 1904.

At 10 A. M. Mr. Harrison continues his argument.
Mr. Derby argues.
Mr. Harrison replies.
The Court takes the matter under consideration.'
(S'g.) GEORGE LUCAS, *Clerk.*

374 December, 1904.

THOMAS MILNER HARRISON
v.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, DOROTHEA EMERSON (*née* LAMB), T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN, and GEORGE D. MOORE.

Exceptions from Circuit Court, First Circuit.

Argued December 6, 1904. Decided December 19, 1904.

Frear, C. J., Hartwell and Hatch, JJ.

PRACTICE—*specifying errors relied on as ground of motion for a new trial.*—A motion for a new trial need not unless required by the court specify the errors alleged to have been made during the trial and relied upon as a ground for a new trial, but unless specified, so that it may appear that the court ruled upon them expressly, they are improperly presented in a bill of exceptions not filed within the requisite time after the entry of the judgment.

NONSUIT—*misjoinder of parties defendant.*—A nonsuit is properly ordered upon failure of the plaintiff in an action against joint contractors to prove that any of the defendants executed or ratified the agreement declared on.

EVIDENCE—*insufficient to show ratification of agreement.*—Four partners of a Hagey Cure Co. signed an agreement in New Zealand whereby the company took in the plaintiff and another as new partners, agreeing to give them £2,250 if, after a certain trial they were not satisfied with the conditions of the business. The three partners resident in Honolulu did not sign or authorize the signing of the agreement. Letters were received in Honolulu from one of the partners in New Zealand mentioning that they had "sold one-half interest in Tasmania for 8,000 sheep and £500" and that "the sale of Tasmania was for nine-twentieths of the
375 territory," and that one of the partners (not having signed the agreement), was coming to Honolulu and would "put things to you as they are." About the same time the partners here received an 18 per cent. dividend on their stock, a small portion of which appeared to have been derived from the Tasmania sale, as shown by the trial balance received at the same time. Held: That this was not evidence on which the partners in Honolulu could be held to have ratified the agreement.

AGREEMENT—*construction of—several liability.*—An agreement purporting to be made between the H. Co., composed of C. K., M., P., M., McS., A. and L. of the first part and G and H. of the second part, whereby "the parties of the first part for themselves individually and the said company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated" is an incomplete agreement for the purpose of forming the proposed partnership unless all the parties sign; there being an implied term in the agreement that all should sign in order that the signers incur several liability. There being no partnership formed in this case in consequence of the failure of four of the parties to sign the agreement, no partnership rights or duties were created by the incomplete agreement.

Opinion of the Court by HARTWELL, *J.:*

This was an action of assumpsit for breach of agreement declared on in a former action brought by the plaintiff against Magoon, McStocker, Ables and Emerson, in which the declaration was held bad for non-joinder of the other parties to the agreement, which appears in the report of the case. 13 Haw. 339. The plaintiff then joined the other parties and obtained a verdict which was set aside on exceptions on the ground that the court erroneously instructed the jury that the agreement was within the scope of the business of the articles of association of the A. P. & I. H. Co. The articles appear in the report of the case. 14 *Ib.* 420. At the next trial the plaintiff was nonsuited because in addition to several other reasons which in the view we take of the case are immaterial, the evidence did not show that the defendants Magoon, McStocker or Emerson had authorized or ratified the agreement. The nonsuit was ordered November 9, 1903, judgment thereon was en-
376 tered November 12. Defendants moved for a new trial November 14 for errors at the trial as well as in granting the nonsuit. January 15, 1904, the motion was dismissed and time for filing the bill was extended. But, unless the filing of the motion suspended the entry of the judgment, the exceptions taken during the trial were not presented within the time required by statute. A motion of the defendants to dismiss the bill on the ground that the exceptions taken at the trial were improperly incorporated in the bill was denied on the ground that the exception to the nonsuit required consideration. 16 *Ib.* 170. We are of the opinion that the only exception in the bill which was presented within the time required by law is that which was taken to the dismissal of the motion for a new trial. The remaining exceptions, which were taken to rulings during the trial, were not "incorporated in the bill of exceptions and presented to the judge" "within twenty days after final judgment or such further time as may be allowed by the judge," as required by the statute (Laws of 1903, Act 32, Sec. 18). The motion for a new trial, although properly made, as held in the previous decision (*Ib.* 176) did not suspend the judgment or operate as an extension of time within which to incorporate such exceptions

in a bill or present the same to a judge. The motion for a new trial was based specifically upon an alleged error in granting the nonsuit and of course the correctness of the ruling on the motion for a new trial may be considered by this court in so far as the granting of the nonsuit is concerned. The motion for a new trial was based also generally upon alleged errors occurring during the trial. Such a motion may be properly based on the general averment of errors committed during the trial provided a specification of the errors is not required by the trial judge or ordered by him at the request of the opposite party. The rulings are usually fresh in mind and there would be no occasion to delay argument until preparation of the transcript. But it does not follow that an exception to a denial of the motion for a new trial would bring before the appellate court all errors thus generally relied on in the trial court. We
377 cannot say that the circuit court in denying the motion ruled upon any question of law concerning its rulings during the trial, or that any question of law relating thereto arose at the hearing on the motion. The plaintiff may have relied on the ground named in his motion that the nonsuit ought not to have been granted on the evidence. At any rate he did not obtain specific rulings on the correctness of any of the trial rulings and therefore there is no question before us concerning them. The only exceptions which we can consider are those which are taken to rulings made by the circuit court "whenever any question of law shall arise in any trial or other proceeding." Sec. 1436, C. L. The only question which we can consider is whether the nonsuit was right. If, on the evidence, a finding that the agreement was ratified by Magoon, McStocker and Emerson would not have been justified, then as far as they are concerned the nonsuit was right. This court has held that the powers of attorney under which the names of Magoon, Emerson and McStocker were signed to the agreement did not authorize the signing. 14 Haw. 424. The evidence at the former trial which the plaintiff offered to show as ratification of the agreement was certain letters which were ruled out, and upon the competency of which for the purpose for which they were offered the court declined to pass in ruling upon the exceptions to the verdict. *Ib.* 425. The plaintiff claims that the agreement was ratified by the partners in Honolulu because, after learning from Australia that the partners there had "sold one-half interest in Tasmania for 8,000 sheep and £500" and that "the sale of Tasmania was for nine-twentieths of the territory," and that Moore, one of the partners, was coming to Honolulu on his way to Texas and "will put things to you as they are," they had failed to inquire of Moore concerning the exact terms of that agreement; and the plaintiff especially contends that when the partners here received about October 30, 1897, the 18 per cent. dividend, a portion of which was derived from the Tasmania sale, as shown by the trial balance received by them at the same time, their keeping that por-
378 tion of the dividend and failing to make inquiry as to the terms of the agreement amounted to deliberate and intentional ignoring of the terms, which would be equivalent to

ratifying them. If it be true, as the plaintiff claims, that the partners resident in Honolulu had sufficient information from the letters, trial balance and accounts transmitted with the 18 per cent. dividend to apprise them that a new partnership had been formed according to the methods adopted when they themselves entered the business and when Wolfenden was admitted in Australia, and that a portion at least of the dividend was derived from the sale of the Tasmania territory, which sale according to the methods of the concern involved the taking in of a new partner, and also assuming that they regarded the Tasmania sale and the taking in of a new partner as unauthorized by them, it does not follow that they could have inferred from any of these things that any personal liability was incurred by the latest agreement concerning Tasmania and taking the plaintiff Harrison into the partnership. Nothing which had been done before, whether with or without their authority, could have led the Honolulu partners to imagine that an agreement had been made in Australia purporting to bind them jointly and severally to pay the new partner Harrison 2,250£ if he should not be satisfied with the Tasmania business. It is not a case in which parties are chargeable with knowledge of all the facts because they knew or had reason to suspect the existence of some of them. The circumstances did not impose upon the Honolulu partners a duty to follow up a line of inquiry in order to ascertain the extent of the new liability attempted to be placed upon them. In Parker v. Cartwright, 7 Haw. 605, the opinion of Dole, *J.*, refers to the law concerning "ignorance of facts of which the parties might have informed themselves," of the effect of "ignorance due to deliberate negligence," and to circumstances which place parties "upon their inquiry," and require that they should "have sought for information from available sources." Many decisions on this subject are cited in the plaintiff's brief, but they do not apply to the facts
379 of this case. There was no evidence on which the jury could properly have found a ratification of this agreement. As to accepting the dividend: As the court held in the former case, "If the acceptance be in ignorance or under misapprehension of any of the essential circumstances relating to the transaction, this will absolve the principal from all liability by reason of any supposed assent to the previously unauthorized act of the agent." *Ib.* We therefore sustain the nonsuit as to the defendants Magoon, McStocker and Emerson and there is no occasion, as far as these defendants are concerned, to discuss the correctness of any of the other rulings, since unless the agreement was either made or ratified by them they cannot be held under it. But the plaintiff claims that the court ought to have nonsuited the plaintiff as far only as these defendants are concerned and permitted him to take judgment against the others who did execute the agreement. The statute, he says, required him to implead all the obligors and therefore he ought not to be deprived of his remedy against the other defendants. The statute does not require persons to be impleaded who are not in fact obligors. A declaration would be good if framed to meet the case of an agreement entered into by only a por-

tion of the names appearing in it and not joining the names of others signed by attorney provided the plaintiff is willing to admit and avers in his declaration that the other names were signed without authority. By declaring against all, however, he took the chances of being able to show that they had all executed the agreement, and was liable to "be nonsuited at the trial of he fail in proving a joint contract," (1 Ch. on Pl., 51), unless this was an agreement binding upon the defendants severally as well as jointly.

In considering the demurrer in the first action the court construed the agreement that "the parties of the first part for themselves individually and the said company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated" as being in effect that "the parties of the first part do hereby jointly and severally make with the parties of the second part
380 the following agreement of partnership." 13 Haw. 360. It is contended on behalf of the defendant Ables that this was *obiter dictum* and the court is not precluded from now considering whether a several liability was created by the agreement. In passing upon the demurrer the court decided upon the effect of not joining all of the contractors, but unless the declaration alleged a joint liability it would have been unnecessary to join them if there was a several liability. The declaration appears to have been framed upon the theory of joint liability of the defendants Magoon, McStocker, Ables and Emerson. If they were jointly liable the other parties to the agreement were so also, and perhaps it was unnecessary to pass upon the question of several liability. We consider the question open for reconsideration. The agreement purports to be "made this 20th day of September, 1897, between The African Pacific and Indian Hagey Company, an association of partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, the said partnership being composed of the following members: T. E. Cowert, J. H. Kirkpatrick and Geo. D. Moore, of the state of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore and Thomas Milner Harrison, both of the city of Auckland in the colony of New Zealand, parties of the second part." It is not clear in what sense the words "individually" and "collectively" are used. To hold that the members of the original partnership, in using the word "individually," intended that they should be severally bound if all were not would be going further than we think is authorized by the agreement. In denying the plaintiff's motion for a rehearing of the decision sustaining the demurrer the court said: "Whether or not, if it shall appear hereafter that some of the persons named as defendants neither executed nor subsequently ratified the execution of the agreement, the others can still be held jointly liable, and * * * are questions which have not yet arisen and upon which no opinion
is expressed." 14 *Ib.* 532. The court evidently had in mind
381 the question whether the agreement would be complete unless all signed or ratified. Courts sometimes classify agreements between several persons as "incomplete" if not signed by all who are

named in them. This is on the theory of an implied term that all are severally bound in case only of all signing. In looking at the present agreement we reach the same conclusion by applying the theory of an implied term and by looking at the words used and the intended object. It is essential to a partnership agreement that each person mentioned as a partner severally agrees upon being so; and each of such persons can if he likes agree that the proposed partnership shall do certain things, or that the old firm of which he is a member shall enter into the new partnership and then do certain things. We do not see any such undertaking in the language used in this agreement. "In order to constitute a separate liability only, in those cases where several persons contract together for the performance of a particular act, the intention must be made plainly apparent by express words. This intention is to be gathered from a careful consideration of the whole tenor and general intent of the contract, and not from any particular words of severalty contained in it." 2 Chit. Cont., 11 Am. Ed., 1354. An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not binding upon any one of them unless all execute or subsequently ratify the agreement. The thing to be agreed upon was that all the parties named and not certain of them should form a partnership. If no partnership was formed then there were no partnership rights or duties created by the incomplete agreement. The agreement which purported to be made between the Hagey Co., composed of Cowart, Kirkpatrick, Moore, Powter, Magoon, McStocker, Ables and Lamb of the first part and Gilmore and Harrison of the second part, was that the Hagey Co. collectively and its members individually "do hereby constitute and accept the said parties of the second part as partners as hereinafter stated." The
382 partners who signed did not severally agree that they severally would form a partnership with Gilmore and Harrison but that all of the partners did so. The agreement was ineffective for the purpose of forming a new partnership in consequence of the failure of certain of the Hagey Co. partners to execute it, and therefore Gilmore and Harrison were not constituted or accepted as partners and acquired no partnership rights. The views above expressed render discussion of the other exceptions unnecessary.

The exceptions are overruled.

Robertson & Wilder for plaintiff, who also appeared in person.

J. A. Magoon and J. Lightfoot, Kinney, McClanahan & Cooper and S. H. Derby for defendants.

(Sg.) W. F. FREAR.
(Sg.) ALFRED S. HARTWELL.
(Sg.) F. M. HATCH.

383 In the Supreme Court of the Territory of Hawaii.

THOMAS MILNER HARRISON, Plaintiff, Appellant,
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, and DOROTHEA EMERSON, *née* LAMB, ET ALS., Defendants, Appellees.

Petition for Rehearing.

Thomas Milner Harrison, plaintiff Appellant in this case, asks the Court for a rehearing of this cause, on the following grounds.

I.

In 13 Hawaiian 360 this Court in referring to paragraph 4 of the agreement for breach of which this action is brought says:

"The paragraph, however, cannot we think, be read by itself; it must be read in connection with the opening sentence above quoted, and if so understood the result is the finding that the promise in question was a joint and several obligation on the part of the members of the company."

The decision, concerning which this rehearing is prayed, holds the above quoted ruling "open for re-consideration." It then holds that as the said agreement purported to form a new partnership it could not be completed until all the persons who were intended to form the new partnership had either personally signed it, or ratified the acts of those who signed on their behalf. Consequently, if any of the parties to it failed to ratify it, the agreement would be incomplete.

Thus the members of the Hagey Co. contracted jointly with
384 Harrison and Gilmore and not jointly and severally, and, as a result, if they all were not bound by that agreement, it being only a joint obligation, none of them would be bound. The Court, however, had already found that Magoon, McStocker and Emerson had not been bound by the agreement when it was made, nor yet had the plaintiff been able to produce evidence that they had ratified it. Hence the Court ruled that none of the members of the Hagey Co. were bound. The Court further held that as all the defendants were sued jointly, if the plaintiff failed to show that they were all bound by the agreement then he was liable to "be non-suited at the trial if he fail in proving a joint contract."

This last proposition, that the plaintiff was liable to be non-suited against all the defendants if he failed in proving a joint contract, was not fully argued by the plaintiff at the last hearing before this Court, as he considered that the ruling quoted from 13 Haw. 360 was final; and that, consequently, he was suing for breach of a joint and several contract. And the plaintiff further respectfully submits that such cases as he did quote,—to show that though he failed to prove a joint contract against the defendants when they had contracted jointly, and not jointly and severally, he yet was entitled to recover against such of them as had undertaken, without due authority, to bind all the defendants jointly,—were overlooked.

In Taft *v.* Church 162 Mass. 528, referred to in plaintiff's brief on last agreement, when "an agreement in writing, under seal, was signed by A. in the name of a firm composed of A. and B., it was held: "If one of two partners, without the knowledge or consent of the other, executes a contract which is outside the scope of the partnership business he may be bound, although the other is not."

It was also there held "In an action against two person- as partners if one only is held liable judgment may be entered against him alone, under Pub. Stat. 171, sec. 5, and no amendment of the declaration is necessary.

385 In Harrington *vs.* Higham 15 Barb (N. Y.) 524, referred to in said brief but like Taft *vs.* Church not there quoted from, it was held;—where some of the members of a firm had agreed on behalf of the firm (and not for themselves severally) to submit a matter to arbitration without having authority to make such an agreement,—

"A recovery may be had upon such an award, against the partners consenting to the submission, on a complaint against all the members of the firm, alleging a joint liability.

"Under the 274th section of the code &c. * * * The true criterion now is, whether a separate action might have been maintained. If it could, a several or separate judgment is proper."

The law on this point is explained fully in 11 Ency. of Pl. and Pr. 847 *et seq.* where it gives the rule, as stated in the decision concerning which a rehearing is requested, as follows:

"At common law, where several defendants are sued jointly in an action contract, the plaintiff must have judgment against all of the defendants who are before the Court, either by service of process or by appearance, or he can have judgment against none."

But succeeding this statement at *Idem page* 853 *et seq.* it reads:

"The common law rule in respect of judgments in actions *ex contractu* against joint defendants has been changed by statute *in most, if not all, of the states,* so that in actions against several upon contract the plaintiff may have judgment against one or more of the defendants if he shall make out a good cause of action against them, although he may fail as to others, whether the contract be joint or several, or joint only."

The statute referred to in the last quotation is in Massachusetts, New York, and nearly all the states the same as in California, where it is given in section 578 of the Deering California Code of Civil Procedure as follows:

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

The section last quoted is generally considered as a necessary sequel to section 383 of *Idem,* which reads:

"Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may *all* or *any* of them

be included in the same action, at the option of the plaintiff."
386 Section 1222 of our Civil Laws provides:

"It shall be necessary to join as defendants in a civil action, *all* the joint and several, or joint makers of promissory notes, etc."

Now it is respectfully submitted that when it was not left even optional for the plaintiff to join (all or any) of the joint and several or joint defendants, as is done in California it must have been the intent of the law makers that; "Judgment may be given for or against one or more of several defendants; and it may, when the justice of the case requires it determine the ultimate rights of the parties on each side, as between themselves." This is specially apparent when we consider the exceptionally liberal terms of the Hawaiian statute of 1903. Act 78 page 366, which enlarges the terms of the Civil Laws sec. 1260 by amending it so as to read as follows:

"Whenever a plaintiff in an action shall have mistaken *the form of action suited to his claim,* the Court or Judge, on motion, shall permit amendments to be made on such terms as it shall adjudge reasonable; and the Court or Judge may, in furtherance of justice and on the like terms, at the trial or on appeal, *or at any other stage, before or after judgment,* allow *any petition* or pleading or process or proceeding to be amended by adding or *striking out* the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, *or by inserting other allegations material to the case,* or, when the amendment does not *substantially change the claim or defense,* by conforming the pleadings or the proceeding to the facts proved.

We consequently submit that the last quoted statute in conjunction with the Civil Laws sec. 1222, alters the common law rule so that when defendants are sued jointly the plaintiff may amend by discontinuing against such as he fails to make a good cause against, and proceeding against "one or more of the defendants he shall make out a good cause of action against." And then as a result "Judgment may be given for or against one or more of several defendants; and it may (the Court) when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

At the trial of the case at bar, when the Circuit Judge found no case was made against the defendants Magoon, McStocker or Emerson, he refused to let the plaintiff amend by striking out the names of those parties and proceeding against such as personally
387 signed the contract. And when the motion for New Trial was heard, the right of the plaintiff to amend by discontinuing as against Magoon, McStocker and Emerson, and proceeding ag-inst Ables, and perhaps the others, was the point most stren-ously urged, and the trial Judge said he thought the plaintiff was entitled to so amend and proceed but held that he had not power to grant a new trial after non-suit. Hence we contend that such an amendment should be now allowed and the case remitted to the Circuit Court for trial as against the defendants, other than Magoon, McStocker and Emerson above named.

In Texas where, as here, there is no statute referring to judgments similar to section 578 of the California Code just quoted but merely

a statute providing for the joinder of defendants at the option of the plaintiff and not making such joinder necessary as has been done here, it was held in Willis *vs.* Morrison 44 Texas 27 that:

"In a suit against A. and B. on a draft, which on its face appears to have been executed by both of them as partners *in the Firm name*, but which was executed by A. only, judgment may be rendered against A. and in favor of B. when it is shown under plea of *non est factum*, that the draft was not executed by B. or by his authority.

"The rigid system of the common law regarding forms of action which required the plaintiff to be non-suited if he sued two persons on a joint contract, and one of them showed himself not to be liable, has no application here."

Willis *v.* Morrison, 44 Texas 27.

This matter was threshed out at length in three decisions in California. The first one was in Rowe *vs.* Chandler 1 Cal. 168, which held

"Where two persons are sued jointly upon a joint contract, judgment may be rendered in favor of the plaintiff against one of the defendants, and in favor of one of the defendants against the plaintiff. Thus, where A. sued B. and C., as partners, and the misjoinder was not set up in the answer, and the plaintiff's demand was proved against B. but not against C. and verdict and judgment were given in favor of the plaintiff against B. and in favor of C. against the plaintiff, on appeal, the case was confirmed."

At page 170 in the same case the report says:

"It was settled law, under the old system of practice that where one of several joint contractors was sued, the plaintiff might proceed and take judgment against him, unless he interposed a plea of non-joinder in abatement (1 Chitty's Pl. 52, 53); whereas, in case
388 too many persons were made defendants, it was a fatal defect, according to circumstances, upon demurrer, motion for non-suit at the trial, motion in arrest of judgment, or Writ of Error.

The report again continues at page 175 as follows:

"We have above seen that there is nothing more incompatible with principle in requiring a mis-joinder to be pleaded in abatement, than in requiring a non-joinder to be thus objected to; and we think that the former objection, equally with the latter, ought to be taken in the answer."

In Stearns *v.* Aguirre 6 Cal. 176; Rowe *v.* Chandler, 1 Cal. 168, just quoted from, was overruled and a non-suit similar to that in the case at bar sustained. The syl-abus of that case reads:

"In all cases of joint and several contracts the plaintiff may elect whether he will sue the defendants severally or jointly; having elected to treat his demand as joint, for the purposes of the action, he must be governed by the same rules which would have applied, if his contract originally had been joint, and not joint and several, and it is clearly error to enter several judgments against the defendants.

"There is nothing in the Practice Act of this state which has altered the common law rule."

But in Lewis *v.* Clarkin, 18 Cal. 399, the last ruling was reversed as follows:

"Held: Practice Act has modified the common law rule—that in a suit against several joint debtors the plaintiff must recover against all or none—so far, at least, as to permit judgment, against a portion of the defendants wherever the contract purports on its face to be the contract of all the parties sued and it turned out in proof that a portion only are liable.

"See Stearn *v.* Aguirre 6 Cal. 176; in this respect overruled."

This last ruling has been followed in all subsequent cases in California.

See People *v.* Frisbie, 18 Cal. 399; and numerous other cases mentioned in 11 Ency. Pl. & Pr. 854, note 1, and also Tay *v.* Hawley 39 Cal. 93.

In Morgan *v.* Righetti (Cal. 1896) 45 Pac. Rep. 260; it was held:

"Two persons being sued on an alleged partnership debt, and it being found that they are not partners, but that the debt is the individual debt of one of them, judgment may be rendered against him."

389 See Rutenberg *vs.* Main 47 Cal. 213;
Thain *vs.* Forbes 82 Cal. 577;
Bailey Loan Co. *vs.* Hall 110 Cal. 490;
Gruhn *vs.* Stanley 92 Cal. 86;

And this is the law of California although the statute there permitting amendments, as in all the other Code states, is not so liberal as ours, since it says nothing about amending when the plaintiff has mistaken his form of action, and is less complete in other respects.

See Code of Civil Procedure for California, Section 473.

In New York where the law is similar to that of California in this respect the same practice prevails as in Claflin *vs.* Butterly 2 Abb. Pr. 446; also 5 Deur (N. Y.) 327, it was held:

"The only question is this; the plaintiff having sued the defendants as partners, on a contract purporting to be signed by the firm, and bearing the genuine signature of the firm, can they have judgment against one only, when it is clear that the other defendant is not liable?

"When two defendants are sued jointly on a contract, which, on its face, is the joint contract of both, but which in legal effect was at all times the contract of one only, a judgment may be rendered against the party liable and in favor of the other."

See also Marks *vs.* Bard, 1 Abb. Pr. 63, 8 Howard, Pr. 151;
8 Howard, Pr. 151;
1 Kenn 294.

So in Stedeker *vs.* Bernard 102 N. Y. 327; it was held:

"In acting upon a check signed in the name of a firm, of which defendants were the individual members, defendants joined in an answer which denied that the check was executed by the co-partnership, but averred in substance that it was made by defendant B. for his own purposes and not in the business of the firm, which was known to the plaintiff when he received it. Held: that plaintiff

was entitled to, and might apply to the Court before trial for judgment upon the pleadings against B.

390 "The common law rule, that in an action against several defendants upon an alleged joint contract, the plaintiff must fail unless he establishes the joint liability of all the defendants is no longer the rule of procedure in this state."

As in McIntosh *vs.* Ensign, *et als.* 28 N. Y. 169, it was held

"A plaintiff is not now to be non-suited because he has brought too many parties into Court."

See also Stimson *vs.* Van Pelt, 66 Barb. (N. Y.) 151 and others N. Y. cases mentioned in 11 Ency. Pl. and Pr. 854 note 1.

In Connecticut where the statute law is similar in this respect to that of California, New York, or Massachusetts, in Dean, *vs.* Savage 28 Conn. 359 it was held:

"It was the intent of the statute to apply to all actions founded on contracts the same rule, with regard to the right of recovery against a part of the defendants, which prevails at common law in the case of action founded on torts."

The practice in Idaho, where the statutes in this respect are like those of Cal., is the same as in Cal.

See Gaffney *vs.* Hoyt 2 Idaho 184.

The same statute law and practice exists in Indiana as in Stafford *vs.* Nutt, 51 Indiana 523, it was held:

"In an action against two or more persons, upon contract, whether the contract be joint and several or joint only, the plaintiffs may have judgment against one of more of the defendants, against whom he shall make out a good cause of action, although they fail as to the others."

See also Richardson *vs.* Jones 58 Indiana 240:

The same statute law and Practice exists in Iowa as in Gillam *vs.* Hintrager 60 Iowa 180, it was held:

391 "Where the action was begun against two as partners, but was prosecuted against one of them only, there was no error in rendering judgment upon a verdict against this one only."

See also Eyre *vs.* Book 10 Iowa 586 and other Iowa cases mentioned in 11 Ency. Pl. and Pr. 85 note 1.

The same practice in this respect prevails in Mich. although no code or statute is referred to in the reported cases. In Roberts *vs.* Pepple 55 Mich. 367 it was held:

"Plaintiffs sued defendants jointly on several notes signed, with defendants' partnership name of J. T. Pepple and Co. Wilcox defended on the ground that the notes were given without his assent for private obligations and purposes of Pepple, and that plaintiff did not take them in ignorance of their purpose. The verdict below was in his favor. Judgment rendered against Pepple alone, who has not appealed. Plaintiff brings error, Judgment affirmed."

The same practice prevails in Minnesota, where in Keigher *vs.* Dowler 47 Minn. 540, it was ruled:

"Plaintiff sued three persons as joint defendants, alleging (as the fact was) that they were partners. He proved a cause of action

against two of the defendants, but not against the third. Held, that judgment was properly rendered against two:

"Here the plaintiff sued the three defendants, alleging that they were partners. The proof was that the contract declared on was made by two of the defendants, but was not within the scope of the partnership, and hence no cause of action was proved against the third defendant. * * * The appellant's contention proceeds upon the erroneous idea that the action was not against the individual composing the firm, but against the firm."

The statutes and practice in Missouri are similar in this respect to Cal. In Crews *vs.* Lackand 67, Mo. 619 it was held:

"The common law rule which prohibited recovery against any one of several defendants sued as joint contractors, unless the proof showed a joint contract, has been abrogated by Section 32, p. 1019 Wag. Stat. Under that section a Plaintiff, suing against several as partners for breach of contract, may recover against such as he can prove to be parties to the contract, without proof of the partnership."

392 The same practice prevails in Montana;
See Knatz *vs.* Wise 16 Mont., 555;

The same practice prevails in Nebraska;
See Roggenkamp *vs.* Hargreaves, 39 Neb., 540.
The same practice exists in Ohio;
See Lampkin *vs.* Chisom, 10 Ohio, State, 451.
The same practice and statutes exist in Oregon; 205, it was held:
In Ah Lep *vs.* Wong Choy and Gong Wing, 13 Oregon, 205, it was held:

"Under the code, in an action against two or more partners upon a joint obligation, when a member of the partnership has borrowed money on his own account and the firm is not liable, a separate judgment may be had against the partner who gave the joint obligation."

The same practice exists in Texas, although the code provision as to judgment is not law there;
See Forbes *vs.* Davis, 18 Tex. 274;
Wooters *vs.* Smith, 56 Tex. 198, as well as Willis *vs.* Morrison, 44 Tex. 27 before referred to.

There are some English cases mentioned in 1 Bates on Partnerships, note 2 to section 349, which maintain the same principle; and the last paragraph of the said section 349 reads:

"The partner who signed the firm name without authority is himself bound, the same as if he had signed his own name."

In Ramsbottom *vs.* Lewis, 1 Camp. 279. The last sentence of the report reads: "The declaration states that both partners drew and endorsed the bill; but upon this last supposition, at the time of the endorsement, one partner had no longer any interest in it. The partnership had in fact ceased to exist, and the solvent partner was to be considered as tenant in common of the bill along with the assignees of the other. Nor, as the declaration now stands, would it be enough to show that the bankruptcy of Moffet took place before the bill was drawn; for though in that case it might have been de-

clared upon as the bill of Brown alone, still both are stated as joint partners to it. The jury found a verdict for the plaintiff."

393 So in Owen *vs.* Van Uster, 106, B. 318, it was held:

"That one who individually accepts a bill addressed to a firm of which he is a member is individually liable thereon.

The bill was addressed to the Allty-Crib Mining Company, and accepted by the defendant, as follows: Per. proc. The Allty-Crib Mining Company, W. Y. Van U. London manager: It was proved that four persons, one of whom was the defendant, had agreed to work a mine, under the name of the Allty-Crib Mining Company, and had for some time worked it accordingly; and that the bill in question had been accepted by the defendant without the authority of his co-partners. Held: That the defendant was liable upon the bill, as acceptor."

So in Nicholls *vs.* Diamond, 9 Ex. Welsh, *H.* & 9, 154, it was held:

"A Bill of Exchange directed to J. D., purser, West Downs Mining Company was accepted by him as follows: J. D. per. proc. West Downs Mining Company. J. D. was a member of the Company, which was not incorporated. Held: That J. D. was personally liable on this acceptance."

As to the practice of the English Courts since the Judicature Act of 1848 the case at Bar as tried in New Zealand when judgment was given against all the defendants but two, is very much in point.

In 11 Ency. Pl. & Pr. 854, note 1, it names 27 states in which it is the law. "That in actions against several upon contract, the plaintiff may have judgment against one or more of the defendants if he shall make out a good cause of action against them, although he may fail as to the others, whether the contract be joint or several, or joint only."

It is submitted that such is the law in Hawaii, while the cases, above referred to and quoted from, show that in all the states mentioned where one or more partners contract on behalf of the firm jointly (and not for themselves severally) but have not authority to bind the firm, although so far as the firm is concerned it is an incomplete contract and not binding on it, yet the partners who undertook to so bind the firm without sufficient authority

394 are liable in damages for the failure or breach of the contract that cannot be enforced against the firm, and this although the party to the incomplete agreement claiming damages from the partners who endeavored to bind the firm, but lacked authority to do so, knew of the want of authority at the time the agreement was signed.

We submit that the agreement sued upon in this action, it appearing that Magoon, McStocker and Emerson are not bound by it, is such an agreement as those referred to in the last paragraph; and that, consequently, those defendants, who personally made the agreement and by so doing practically guaranteed that they either had authority to bind the Hagey Company or that the other members of the Hagey Company would ratify their acts, are liable in damages for the non-fulfillment of the terms of the agreement by the Hagey Company. See Story on Agency Sec. 265. We also submit that it

is proper practice for the Court, under the circumstances in this paragraph stated, to permit the plaintiff, to amend his complaint by discontinuing as to those defendants, who, it appears, are not bound, and to proceed against the defendants who personally executed the agreement and those, who, by default, have, at least *prima facie*, admitted that either those who executed the agreement had authority to bind them or that since the agreement was made they have ratified it.

We submit that Harrington *vs.* Higham, 15 Barb. (N. Y.) 524, the second case quoted from in this petition, is peculiarly in point in that two out of three partners were held liable when they had attempted to bind the firm to an arbitration award without due authority, The same is held in Keigher *vs.* Dowlan, 47 Minn. 540.

395 The plaintiff consequently prays a re-hearing on this point on the ground that it was a mistake of law in the decision not to let him so amend his complaint as to discontinue or be non-suited concerning Magoon, McStocker and Ables, but to proceed as to the other defendants, who either personally signed the agreement, or by failing to appear and answer are presumed to have either given those who signed the agreement authority to bind them or have since ratified the agreement.

II.

396 Should, however, the Court see fit to deny the plaintiff a rehearing on the above stated ground, then the plaintiff prays a rehearing in order that he may move the Court to permit him to amend the declaration in this action so that the same shall read according to the copy of proposed amended declaration hereto attached.

He makes this request under Session Laws of 1903, Act 78, page 366, which reads: "Whenever a plaintiff in an action shall have mistaken the *form of action* suited to his claim, the Court or Judge, on motion, shall permit amendments to be made on such terms as it shall adjudge reasonable; and the Court or Judge may, in furtherance of justice and the like terms, at the trial or *on appeal,* or at any other stage, before or *after judgment,* allow any petition or pleading or process or proceeding to be amended by adding or *striking out* the name of *any party,* or by correcting a mistake in the name of a party, or a mistake in any other respect, *or by inserting other allegations material to the case,* or, when the amendment does not substantially change the claim or defense, by conforming the pleadings or the proceedings to the facts proved."

The plaintiff submits that the proposed amendmnet, as stated in the proposed amended declaration, which consists of declaring on a *quantum meruit or a quantum valebant,* when it has been found, after taking testimony in Court, that the express contract under which the *quantum meruit* or *quantum valebant* was given cannot be maintained, is such an amendment as is allowable in states where the statutes permitting amendments are not so liberal as that in force here, that has just been quoted. It is also submitted that it is an amendment which is not barred by the statute of limitations.

In 1 Ency. Pl. & Pr. 516 it is stated: "Although the granting or refusal of leave to amend rests within the sound discretion of the court, a multitude of authorities declare the salutary rule that statutes of amendment are remedial and must be construed and ap-
397 plied liberally in favor of the privilege of amending. *Upon this proposition there are no dissenting authorities.*'

And where amendments are allowed by statute, as here, the action of the trial court in exercising discretion as to amendments is subject to review. *Idem.* 525-532. While where the trial court has held that it had not authority to permit an amendment or refused leave to amend contrary to law, its decision is always reviewable without statutory authority. *Idem.* 531-532.

The fact that the renewing of an action in an amended form is barred by the statute of limitations, as is the case at bar, is also an additional reason why amendments should be allowed.

1 Ency. Pl. & Pr. 518 reads: "Where a proposed amendment consists of new matter relating to the subject of the action as set forth in the complaint, and is not a new and independent cause of action, the fact that the statute of limitations has attached to it pending the suit is a strong reason for allowing the amendment insead of refusing it."

In amending so as to sue for a *quantum meruit* or *quantum valebant* when an express contract has first been sued upon and the plaintiff has failed to establish it, the amendment merely enables the plaintiff to proceed on a promise implied by the express contract should its express terms be unenforceable. The Summary statement of the Rule concerning what amendments are allowable is found in 1 Ency. Pl. & Pr. 564 which reads: "As long as the plaintiff adheres to the contract or the injury originally declared upon, an alteration of the mode in which the defendant has broken the contract or caused the injury is not an introduction of a new cause of action."

So again 1 Ency. Pl. & Pr. 621 states that such amendments are not barred by the statute of limitations, as it reads: "Where an amendment does not set up a new cause of action or bring in any new parties, the running of the statute of limitations is ar-
398 rested at the date of filing the original pleading."

Note 3 to *Idem* 621 sets out cases from more than twenty states in *in* support of this statement. The case that perhaps most strongly in all points resembles the case at bar is Cox *vs.* McLaughlin. 70 Cal. 60, which reads: "A complaint in an action for breach of contract, which as originally framed seeks to recover the contract price of services performed by the plaintiff in pursuance of the contract, together with profits which he would have made, on the ground that he had been technically "Prevented" from completing the contract by the defendant, may be amended so as to aver a claim for the value of the services actually done as upon a *quantum meruit.* Such an amendment is not the substitution of a new action so as to continue the running of the statute of limitations until its filing."

Although the syllabus just quoted stated that the plaintiff was permitted to amend so as to sue for a *quantum meruit,* yet the report shows he was permitted to amend so as to sue for both a *quantum*

meruit and a *quantum valebant,* as the amended complaint was for not only the value of services rendered, but for material furnished as well. The amendment was filed nearly twenty years after the action had been commenced.

Cox *vs.* McLaughlin still further resembles the case at bar in that final judgment by the Court of last resort, reversing a verdict for the plaintiff, had been given for the defendant, when application was made for a rehearing on the ground that the plaintiff was entitled to amend so as to sue for a *quantum meruit* and *quantum valebant,* although he was not entitled to recover on the express contract upon which the action had been originally based. The rehearing was granted and the plaintiff having amended his complaint was afterwards successful.

399 The theory, we apprehend, upon which a plaintiff may amend so as to sue for a *quantum meruit* or a *quantum valebant* in order to recover for a consideration given under an express contract which he has been unable to enforce by the original suit, is that the implied promise which he has to expressly plead when suing for a *quantum valebant,* arises from the original contract, that is, that the person who received the consideration impliedly promised when he made the express contract, to return it, should the express contract essentially fail.

"Where a special Contract is imperfect, the plaintiff may declare on the implied promise."

4 Encyc. Pl. & Pr. 927.

So in other cases it was laid down: "Upon the trial the plaintiff was allowed to amend his complaint, so as to recover the actual value of the services rendered by him to the defendant, on the ground that as the contract, upon which the action was brought was void, he was entitled to recover the value of the services actually rendered.

"Held that this was proper. That it was not substituting a new cause of action, but in legal effect, conforming the pleadings to the facts.

Yurnow *vs.* Hochstadter 7 Hun (N. Y.) 80.

"An amendment of a complaint, which alleges an agreed price for services, by inserting an allegation as to their reasonable value, does not change the cause of action."

Copeland *vs.* Johnson Mfg. Co. (Supreme Court) 3 N. Y. Supp. 42;

1 Ency. Pl. & Pr. 565 (Note 5 to page 564).

"Plaintiff sued on a *quantum meruit* for carpenter's work done, and material furnished in the completion of defendant's house. Defendant answered that there was a special contract whereby plaintiff undertook to complete the job by a given time, for a specified sum; that the house was consumed by fire before completion by the plaintiff, so that nothing ever became due the plaintiff; and

400 that more than two years had elapsed since the making of the contract and before commencement of the suit, and, therefore, the action was barred by limitation, etc."

Plaintiff, by amendment, adopted the special contract alleged by the defendants, but claimed that it was apportionable etc. The house was burnt in December 1868, and when plaintiff had nearly completed it, the suit was brought in November, 1868, and the amended petition adopting the special contract was filed in January, 1869, and more than two years after the performance of the work and the destruction of the house. But held, that the amended petition did not set up a new cause of action, and, therefore, the plaintiff was not barred by limitations.

Hollis *vs.* Chapman 36 Tex. 1.

A copartner, with power to settle and adjust the affairs of the copartnership, has no authority to use the name of the firm in such settlements to create new contracts or liabilities.

"A note given in pursuance of such authority in settlement of an outstanding account against the firm, is not binding upon the other members, and is not a discharge of such claim."

"In a suit upon a note so given, leave was granted to amend by filing a new count for the original claim."

Perrin *vs.* Keen 19 Me. 355;
1 Ency. Pl. & Pr. (567) note 5 to page 564.

"Where plaintiff declared on a note and for money expended on an *insimul computasset* and for work and labor and materials, he was allowed to amend by claiming to recover on a due bill and a book account."

Fairchild *vs.* Dennison 4 Watts (Pa.) 258.

Amendment of complaint by allowing the addition of a count for money had and received to a complaint founded on contract permitted in.

Rodrigue *vs.* Curier 15 S. & R. (Pa.) 81.

"*Quantum valebat.*—Where the complaint proceeds upon the basis of a contract price it may be amended by claiming damages by reason of the breach of a contract so as to conform to the proof."

401 Evans *vs.* Warner, 21 Hun. (N. Y.) 547;
Also I Ency. Pl. & Pr. 548 (note 1 to *Idem* 583).

Suit brought on note; amendment stating as cause of action the debt due, held not to be new cause of action or barred by statute of limitation.

Bryce *vs.* Massey 14 S. E. Rep. 768;
See Heath *vs.* Whidden 29 Me. 108;
See Kuhn *vs.* Brownfield 12 S. E. 519;
See Dance *vs.* McClure 39 Vt. 196;
See Bruns *vs.* Schreiber 48 Minn. 366.
See Chicago Elc. R. Co. *vs.* Bills 118 Ind. 221.

The last six cases all maintain the last stated principle.

"An action for money had and received may be amended by declaring on a promissory note given therefor."

Brackett *vs.* Crooks 24 N. H. 173;
1 Ency. Pl. & Pr. 546 note 5 (567).

So an action on a note may be converted into an action for goods sold and delivered.

Burnham *vs.* Spooner 10 N. H. 165;
Libley *vs.* Young 26 S. Car. 415.
Stephens *vs.* Thompson 28 Vt. 77;
Pierce *vs.* Wood 23 N. H. 519;
Stevenson *vs.* Mudgett 10 N. H. 338.

"The plaintiff, on the request of the defendant paid for a share in oil land alleging that he had been deceived by defendant, he sued him in case and declared in assumpsit; for money had and received. Plaintiff was nonsuited at the trial; the nonsuit was afterwards taken off, and plaintiff permitted to declare in tort for the deceit."

"The cause of action accrued more than six years before the
402 amendment but not before the bringing of the suit. Held the cause of action being the same, the statute of limitations was not a bar."

Smith *vs.* Bellows 77 Pa. St. 441.

"Where an action is begun within the time prescribed by the statute, and certain relief is asked, and, after the cause would be barred by the statute, the plaintiff files an amended petition, setting up the cause of action, but asking different relief, held that the amendment is not the beginning of a new action, but a continuance of the old one, and that the action as founded on the amended petition is not barred."

Case *vs.* Blood 71 Iowa 632.

"If the facts set forth as the basis of recovery are the same in an original and in an amended petition, though the relief prayed for in the amendment may be different, the cause of action remains the same.

Telffner *vs.* Dillard 70 Texas 140;
Also held in Western Union Tel. Co. *vs.* Brown 62 Texas 36.

"A declaration on the bond of a residuary legatee alleging the failure to pay a claim is amendable by adding a count alleging the failure to pay a note which constituted the claim, even though the note itself was outlawed; no new cause of action is added by such an amendment."

Abbott *vs.* Chambers 55 Mich. 410;
See also Baltimore Elc. R. Co. *vs.* Gibson 41 Ohio State 145;
Ely *vs.* Early 94 N. Car. 1;
Myers *vs.* Kirt 68 Iowa 124.

"Where the facts as stated in the original complaint show different parties from those first named as plaintiffs or defendants to be entitled or liable, an amendment, changing the parties to the suit so that those really entitled or liable are the only parties to it, is not barred by the statute of limitations."

"The Courts possess the power at any time before or after judgment, to amend, by adding or striking out the name of any
403 party or by conforming the proceedings to the facts proved."

Ballard *vs.* Johnson 65 N. C. 436.

So in Dowsett *vs.* Jones 9 Haw. 543 it was held: "The plaintiff is given leave to amend by striking out the name of the husband, as defendant, in view of the circumstances of the case, and especially of the fact that the statute of limitations has become a bar to a new action since the commencement of this action.

"Amendment substituting new plaintiffs allowed, as not barred by statute of limitations."

Wood *vs.* Lane 84 Mich. 521.

"In an action on a contract alleged to have been made with plaintiff, an amended complaint showing that the contract was made with plaintiff and another jointly, and that plaintiff had acquired the interest of the latter, introduces no new cause of action, so as to be barred by the statute of limitations."

Sublett *vs.* Hodges 7 Southern Rep. 296.

"The time to which the statute of limitations runs is the filing of the original complaint. The filing of an amended complaint does not extend this time up to the period when it was filed."

In this case just quoted from Loranzana *vs.* Camarilla 45 Cal. 125, the amendment pleaded a less number of parties than did the original complaint, yet the amendment was allowed.

See Link *vs.* Jarois 33 Pac. Rep. 206.

"The addition of the name of a silent partner in an amended petition filed in the firm name or enlarging the prayer for relief by amendment, is not a statement of a new cause of action, and will not be subject to amendment to a defense of limitation, which would not be applicable to the original petition."

McIlhenny *vs.* Lee 43 Tex. 205.

Amendment of action against two defendants so as to continue action against one only, not new cause of action.

See Usher *vs.* Skidmore 28 Texas 616.

404 "Statutory authority to allow amendments striking out defendants, who are improperly joined is now almost or quite universal."

1 Ency. Pl. & Pr. 545 and note 1.

The introduction of the two agreements marked (Exhibit B.) and (Exhibit C.) respectively into the amended declaration to show that sheep and an interest in lands were conveyed to Ables is merely stating more fully the consideration of 2000 pounds mentioned in clauses two (2) and five (5) of the agreement sued on in the original complaint, and is consequently merely an amendement stating facts more fully, and not for that reason barred by the statute of limitations.

"Where a proposed amendment to a complaint, consists in the addition of new matter, relating to the subject matter of the action already set out in the complaint, and is not a separate and independent cause of action, new and distinct in its nature and particulars,

the fact that the statute of limitations may have run, pending the suit, and that the defendant will not be at liberty to plead that statute in bar, is not sufficient to prevent the Court from allowing the amendment.

Bisley *vs.* Phœnix 2 Hun. (N. Y.) 349;
See also, On this point Thompson *vs.* Swearengin 48 Tex. 555;
Hastings *vs.* Kellogg 24 S. W. 846;
Recton *vs.* Alexander 27 Texas 659;
Kendall *vs.* Riley 45 Texas 20;
Jones *vs.* Burgett 46 Texas 284;
Killebrew *vs.* Stockdale 51 Texas 529;
2 & 9 Co. *vs.* Irvine 64 Texas 529.

Again an amendment is not barred by the statute of limitations, even though the amount of damages asked by the amended complaint is greater or other than that asked by the original complaint.

"Where an action has been begun within the time limited
405 by statute, an amendment may be filed after the time limited, setting up additional damages arising out of the original cause of action, and such damages may be recovered, if proved."
Cooper *vs.* Mills County 69 Iowa 350.

"If the facts set forth as a basis of recovery are the same in an original and an amended petition, though the relief prayed for in the amended pleading be different, on account of a larger measure of relief being asked for, the character of the cause of action remains the same." Held amendment not barred by statute of limitations.

Western Union Tel. Co. *vs.* Brown 62 Texas 36;
Man de Hear *vs.* Van Domseler 56 Iowa 671;
Smith *vs.* Missouri Pac. R. Co. Fed Rep. 456;
Ball *vs.* Claflin 5 Peck (Miss.) 303 all cited in
Smith *vs.* Palmer 6 Cush. (Mass.) 303.

Where the rule is clearly stated that:

"A new count, for the assertion of a right, or the enforcement of a claim growing out of the same transaction, act, agreement, or contract, upon which the original declaration is founded, *is not for a new cause of action, and may be inserted as an amendment, however different the form of liability may be.*"

"Where several covenants in one instrument are set out, but a breach of only one is alleged, an amendment alleging the breach of another or others may be allowed."

Wilson *vs.* Wideham 51 Me. 366;
Heath *vs.* Whidden 24 Me. 383;
Spencer *vs.* Howe 26 Conn. 200;
Boyd *vs.* Bartlett 36 Vt. 9;
Coxe *vs.* Tilghman 1 Whart. (Pa.) 282;
Hunt *vs.* Taylor 25 Ohio St. 620;
Harris *vs.* Wadsworth 3 Johns (N. Y.) 257.

406 It is submitted that the evidence as given under the original complaint discloses a cause af action against the defendant Ables as stated in the amended declaration annexed hereto, and that such cause of action is an implied contract arising from the circumstances that the contract sued upon in the original complaint is void through no fault of the plaintiff, but through the defendant Ables failing to get all the other parties to the express contract to ratify it, which thing he undertook to do when he made the express contract, and further through the defendant Ables failing to notify the parties to the express contract, who did not personally sign it,—that the contract had been made in their name. From this it would appear that the implied contract is practically a part of the express contract sued upon in the original complaint, and thus an amendment to enforce it is allowable and not barred by the statute of limitations.

"The object of an amendment is to supply the omissions of the original pleadings. Where the amended petition merely enlarges and states more fully and accurately the facts upon which the original petition is based, *or states an additional stipulation in the* agreement between the parties, the statute of limitations presents no impediment to the making of such an amendment *at any time during the progress of the cause.*

Thouvenin *vs.* Lea 26 Tex. 612.

407 In the proposed amendment which the plaintiff has attached hereto, the defendant Ables is the sole defendant.

If this Court thinks it necessary, the plaintiff is willing to retain any of the other defendants as defendants under an amended declaration, such as this Court might think proper. At the last trial before Judge Robinson, the plaintiff testified that the defendant Ables informed him, he intended keeping possession of the sheep and lands and parting with his interest in the Hagey Co. when the sheep and lands were transferred to him, while Ables testified he merely received the transfer of the sheep and lands on behalf of the Hagey Co.

We submit that in either event, if the agreement for breach of which this action was brought is void, Ables is alone liable to the plaintiff on a *quantum valebant,* as he had no authority to receive sheep and lands on behalf of the Hagey Co. on such terms as he received those in question.

To put a hypothetical case: Suppose a patient of the Hagey Institute at Auckland, had given to Ables two thousand pounds cash for safe keeping until he should be cured.

Suppose that Ables took the money but when he received it, said: "I shall not take this money on my own behalf, but as Secretary-Treasurer of the Hagey Co."

Suppose that afterwards this patient goes to Ables, and asks to have the money returned and Ables says: "I cannot give it to you. It was put with the funds of the Hagey Co. and spent in dividends and in conducting their business."

Can the Hagey Co. avoid liability for the repayment of the money

because Ables had no authority to make it liable for sake keeping such a sum?

And can Ables also avoid liability because he took the money as Treasurer of the Hagey Co.?

408 The plaintiff therefore submits—that a rehearing is within the language of our statute "at the trial or on appeal, or at any other stage, before or after judgment,"—he is entitled to such a rehearing in order to make the amendment proposed herein and this more especially as in most of the states and throughout the British Empire, by the Journeys Account Act, see 19 Ency. Law (2nd. Ed.) 262, the plaintiff would be able to recommence his action against the defendant Ables after the present nonsuit; but as there is no statute corresponding to the Journeys account act here, such recourse by him is barred by the statute of limitations, unless he is permitted to amend. It is also submitted that the liberal terms of our statute permitting amendments were evidently designed so that it might to a great extent relieve against the hardships imposed by the statute of limitations under similar circumstances to those under which the Journeys Account Act gives relief.

And your petitioner will ever pray etc.,

Honolulu, H. T., 18th January, 1905.

(Sg.) ROBERTSON & WILDER,
Att'ys for the Plaintiff.

(Sg.) T. M. HARRISON, *Plaintiff.*

409 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, April Term, 1905.

THOMAS MILNER HARRISON, Plaintiff,
vs.
L. C. ABLES, Defendant.

Assumpsit.

Amended Declaration.

To the Hon. J. T. De Bolt, First Judge of the Circuit Court of the First Circuit:

The undersigned, Thomas Milner Harrison, plaintiff herein, claims of L. C. Ables, a citizen of the United States of America residing in the Territory of Hawaii, defendant herein, the sum of ten thousand dollars ($10,000) with legal interest from the 1st day of October 1897, for damages resulting to him for injury done by defendant, and for cause of action alleges:

1. That prior to and on the 20th day of September A. D. 1897, the said defendant was carrying on business with others, namely J. A. Magoon, F. B. McStocker, Dorothes Emerson (Née Lamb), T. E. Cowart, J. H. Kirkpatrick, A. E. Powter, J. Wolfenden, and Geo. D. Moore, as copartners in the Colony of New Zealand and elsewhere under the firm name or style of "The African, Pacific and Indian Hagey Company."

2. That on the date last above mentioned, at Auckland, New Zealand, aforesaid, the said defendant with his copartners T. E. Cowart, J. H. Kirkpatrick, and J. Wolfenden executed an agreement with the said plaintiff and one Alfred Edward Gilmore, a copy whereof marked (Exhibit "A") is hereto attached and made a part hereof, whereby the said defendant and his said *said* copartners in this paragraph named agreed to make the said plaintiff and the said Gilmore copartners with all the members of the said African Pacific and Indian Hagey Company named in paragraph (1) hereof for the purpose of carrying on business in the Colony of Tasmania.

3. That by clauses two and five of the said last mentioned agreement the said defendant with the said Cowart, Kirkpatrick and Wolfenden acknowledged the receipt of two thousand pounds as consideration for admitting the said plaintiff as a partner of all the said members of said African Pacific and Indian Hagey Company, mentioned in paragraph (1) hereof, for the purpose of carrying on business in the said Colony of Tasmania.

4. That the real consideration, which was acknowledged as the receipt of said two thousand pounds mentioned in paragraph (3) hereof, was the transfer by the plaintiff to the defendant, for his own use, of about six thousand sheep and an interest in certain lands in New Zealand aforesaid, the said transfer of the said sheep and interest in lands being made by an agreement executed on the 21st day of September 1897, a copy whereof marked (exhibit "B") is attached hereto and made a part hereof, between the said plaintiff and the said defendant, wherein the said sheep and interest in lands are more fully described, and by another agreement executed on the 1st day of October 1897, a copy whereof marked (Exhibit "C") is attached hereto and made a part hereof, between the said plaintiff and the said defendant and one W. C. Robison, whereby the said Robison released to the said defendant a certain interest he had in about five hundred of the said sheep, and the said plaintiff released the said Robison from certain claims he the said plaintiff had against him the said Robison.

5. That the said defendant, the said Cowart, the said Kirkpatrick and the said Wolfenden each, any, or all of them had no authority to bind the said Magoon, or the said McStocker, or the said Emerson by the terms of the said agreement, a copy whereof marked (Exhibit "A") is attached hereto, as partners of the said plaintiff or the said Gilmore, at the time the said last mentioned agreement was made.

6. That the said defendant, the said Cowart, the said Kirkpatrick or the said Wolfenden or any of them never informed the said Magoon, the said McStocker or the said Emerson, until after the 23rd day of July 1898, of all the material terms of the said last mentioned agreement.

7. That the plaintiff first informed the said Magoon, the said McStocker and the said Emerson, and each of them, of all the material terms of the said last mentioned agreement on the 23rd day of July 1898, by causing a copy of the said last mentioned agreement to be served on each of them.

8. That the said Magoon, the said McStocker and the said Emer-

son, or any of them, never ratified the said last metioned agreement.

411 9. That the said last mentioned agreement is and always has been void and the said plaintiff has never been a partner of all the members of the African Pacific and Indian Hagey Company, or a y of them, and the consideration for which he transferred the id sheep and his interest in the said lands to the said defendant according to the terms of the said agreements copies of which marked (Exhibit "B") and (Exhibit "C") are attached hereto, never existed and has entirely and wholly failed.

10. That the consideration of two thousand pounds, which the said plaintiff acknowledged receipt of from the said defendant by clause eight of the said agreement, a copy whereof marked (Exhibit "B") is attached hereto, was not two thousand pounds in money but the two-fifths interest in the partnership business in Tasmania mentioned and referred to in clauses two and five of the said agreement, a copy whereof marked (Exhibit "A") is attached hereto; and that the said consideration in this paragraph first above mentioned never existed and has entirely and wholly failed.

11. That whereas on the said 1st day of October 1897, at Auckland aforesaid, in consideration that the said plaintiff at the special instance and request of the said defendant transferred to the said defendant the sheep and the interest in lands described in the said agreements, copies whereof marked (Exhibit "B") and (Exhibit "C") are attached hereto, he, the said defendant undertook and then and there faithfully promised the said plaintiff to pay him so much money, together with interest thereon until the time of payment, as the said sheep and interest in lands at the said date first in this paragraph mentioned were reasonably worth, when the said defendant should be thereunto afterwards requested.

12. That the said sheep and interest in lands were reasonably worth ten thousand dollars ($10,000) on the 1st day of October 1897 when they were transferred by the said plaintiff to the said defendant.

13. That on or about the 1st day of November 1897 the said plaintiff requested the said defendant to transfer back to him the said sheep and interest in said lands, or to pay to him what the said sheep and interest in lands were reasonably worth and to

412 cancel and treat as null and void the said agreement a copy whereof marked (Exhibit "A") is attached hereto; but the said defendant neglected and refused, and still neglects and refuses, to transfer back to the said plaintiff the said sheep and interest in lands or to pay to the said plaintiff what the said sheep and interest in lands were reasonably worth, when transferred as aforesaid to the said defendant.

Wherefore the said plaintiff prays judgment against the defendant herein for said sum of ten thousand dollars ($10,000) with interest as aforesaid and costs; and asks the process of this Court to cite the said defendant to appear and answer this complaint before a jury of the country at the April 1905 Term of this Court unless otherwise sooner disposed of by judicial authority.

—— ——, *Plaintiff.*

—— ——,

Attorneys for the Plaintiff.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

Personally appeared Thomas Milner Harrison before me, who, being sworn, on oath deposes and says that the matters and things stated in the foregoing declaration are true to the best of his knowledge and belief.

Subscribed and sworn to before me this — day of —, 1905.

Notary Public, First Judicial Circuit.

413 (EXHIBIT "A.")

[N. Z. Stamp 11 1/10/97 T. M. H.]

Memorandum of Agreement.

Memorandum of Agreement made this 20th day of September 1897, between The African Pacific and Indian Hagey Company, an association of partnership formed in Honolulu, Republic of Hawaii, April 10th 1897, the said partnership being composed of the following members: T. E. Cowart, J. H. Kirkpatrick and Geo. D. Moore, of the State of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore and Thomas Milner Harrison, both of the City of Auckland in the Colony of New Zealand, parties of the second part.

Whereas the said Company have the exclusive right and title to the Hagey formulas for alc-holism and Narcotism in and for the Colony of Tasmania and whereas the said Company have by contract entered into the — day of May 1897 with James Wolfenden secured certain rights relative to the use of the Thompson formulas for said business and whereas the said parties hereto propose to enter into partnership for the purpose of using, administering and vending to others the right to use and administer the said remedies in the Colony of Tasmania and in no other place or places.

Now these presents witnesseth:

For and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated.

1. That the capital of the said partnership shall be (5000) five thousand pounds, of which the said Company shall own (11/20) eleven-twentieths, in consideration of granting all their exclusive rights to use the said remedies in the said Colony to the said partnership hereby formed; and the said Company will supply the said

partnership hereby formed with the said remedies at the cost price thereof, until such time as the formulas for the preparation of the same may be given the said partnership hereby formed; and the said Company will not use the said remedies in the said Colony during the existence of the said partnership hereby formed otherwise than as partners therein; and they hereby convey to the said part-
414 nership hereby formed all their rights, privileges and recourses against others than the said partnership using the said remedies in the said Colony.

2. That the said Gilmore and the said Harrison have paid the sum of (2250) two thousand two hundred and fifty pounds to the said Company for the other (9/20) nine-twentieth- interest in the said partnership hereby formed, the receipt whereof is hereby acknowledged.

3. That the said Gilmore and the said Harrison shall conduct the business of the said partnership in Tasmania each at a salary of (40) forty pounds per month to be a first charge on the receipts of the business after the current expenses have been paid. The said Harrison to act as manager of the said partnership hereby formed and the said Gilmore to act as Secretary thereof.

4. That if at or before the expiration of a period of six months from the date of the departure of the said Gilmore or the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount paid by him of the (2250) two thousand two hundred and fifty pounds mentioned in clause (2) hereof in some other district of the Company's field of operation in exchange for the portion of the said (2250) two thousand two hundred and fifty pounds taken by him, and the Company reserve the right either at the suggestion of the partners in Tasmania or at their own suggestion to send one of their own number or some competent man to aid and assist the partners in Tasmania at the same salary and with the same powers as either the said Harrison or the said Gilmore.

5. That the respective interests of the said Harrison and the said Gilmore in the partnership business in Tasmania are as follows, the said Harrison to have a (2/5) two-fifths interest for which he has paid (2000) two thousand pounds as mentioned in clause (2) two hereof and referred to in clause (4) four hereof, and the said Gilmore a (1/20) one-twentieth interest in the said partnership for which he has paid (250) two hundred and fifty pounds as referred to in clauses (2) two and (4) four hereof.

415 6. That a fund necessary for the starting of the business in Tasmania shall be raised by the partnersh-p hereby formed, and placed in the hands of the said Gilmore and the said Harrison.

7. That the said Company reserves the right to dispose of a (1/20) one-twentieth interest in the partnership hereby formed, for the sum of (250) two hundred and fifty pounds provided the person taking the same is agreeable to the said Gilmore and the said Harrison.

In Witness Whereof the said parties hereto have set their hands this 1st day of October 1897.

(Sg.) T. E. COWART.
J. H. KIRKPATRICK.
J. A. MAGOON,
By His Attorneys, J. H. KIRKPATRICK,
T. E. COWART.
DOROTHEA LAMB,
By Her Att'ys, J. H. KIRKPATRICK,
T. E. COWART.
A. E. POWTER,
By His Att'y, T. E. COWART.
LEMUEL C. ABLES.
FRANK B. McSTOCKER,
Per His Att'y, L. C. ABLES.
J. WOLFENDEN.
T. M. HARRISON.
A. E. GILMORE.

Signed in the presence of
(Sg.) W. C. ROBISON, *N. Z.*

416 (EXHIBIT "B.")

Memorandum of agreement made the 21st day of September, 1897, between Thomas Milner Harrison and L. C. Ables, both of the city of Auckland, in the colony of New Zealand.

Whereas by agreement dated the 1st day of November, 1895, made between William Cowper Robison, sheep farmer and Lawrence Marshall Grace, Licensed Interpreter, the said Grace sold to the said Robison a temporary lease of the lands mentioned in the schedule hereto, for the sum of five hundred pounds, and whereas the said Robison after the said 1st day of November, 1895, undertook to give to said Grace a greater amount than (500) five hundred pounds for the said lease, and whereas the said Robison entered into an agreement with the said Harrison dated the 8th day of December, 1896, whereby he transferred a half interest in the said lease to the said Harrison and undertook to indemnify the said Harrison against farther charges than the said (500) five hundred pounds by the said Grace for the said lease, and whereas by the said agreement dated 8th December, 1896, the said Robison and the said Harrison entered into partnership in the possession of certain sheep grazing on the said lands, and whereas the said partnership was dissolved by an agreement dated the 4th day of May, 1897, made between the said Harrison and the said Robison, and whereas by the said agreement dated the 4th day of May, 1897, the said Harrison retained possession of about (500) five hundred head of sheep grazing on the said lands until such time as the said Robison would secure the payment of (511) five hundred and eleven pounds less the price of the wool clip of the sheep of the said partnership, and whereas the said

Harrison has been obliged to pay Freeman R. Jackson & Co., certain of the expenses of the said partnership accrued since the shearing of the said wool clip for which the said Robison is liable for one moiety thereof.

Now these presents witnesseth:

1. That the said Harrison hereby assigns to the said Ables all right, titles and interests he may have in the said temporary lease and the sheep grazing on the said lands.

2. That at last shearing of said sheep more than (3500)
417 three thousand five hundred sheep and lambs were shorn, and that since said shearing more than (2300) two thousand three hundred merino ewes and eighty long wooled rams were purchased by the said Harrison and put upon the said place.

3. That of the sheep enumerated in clause (2) two hereof not more than ten have been removed from the said place with the knowledge or consent of the said Harrison, except for consumption as mutton by the men working on said place, and the said Harrison guarantees that the said sheep and the wool clip growing thereon are free from all indebtedness except as herein mentioned.

4. That the said Harrison hereby assigns to the said Ables all indebtedness of the said Robison to him and the said Harrison.

5. That the said Ables will release the said Robison from all the said indebtedness, upon the said Robison assigning to the said Ables all interest he may have in the said temporary lease and the said sheep grazing on the said lands, and a certain promissory note for (38) thirty-eight pounds given by the said Harrison to the said Robison.

6. That the said Ables will not release the said Robison from any of the said indebtedness until the said Robison delivers to him the said note and that the said Ables on obtaining the said note will release the said Harrison from payment thereof and deliver the same to him.

7. That the said sheep are ear-marked ewes and rams or wethers reverse.

8. That in consideration of this assignment the said Ables has paid the said Harrison the sum of (2000) two thousand pounds the receipt whereof is hereby acknowledged.

THE SCHEDULE.

All those pieces or parcels of land situate in the district of Tauponuiata in the provincial district of Wellington containing 24,486 acres more or less being Tawhai South 2,000 acres, Okahukura No. 7 10,000 acres, Okahukura No. 8*b* 6,799 acres, Okahukura No. 8*c* & *d* 892 acres, Okahukura No. 8*e* & *f* 892 acres, Okahukura No. 8*g* & *h* 892 acres, Okahukura No. 8*j* & *k* & *l* 600 acres, Taurewa No. 2 500 acres and Taurewa No. 3 160 acres.

In witness whereof the said parties hereto have set their hands the 21st day of September, 1897.

(Sg.) L. C. ABLES.
(Sg.) T. M. HARRISON.

Signed in the presence of
(Sg.) J. B. DANIELS.
(Sg.) D. J. KIRKPATRICK.

418 (EXHIBIT "C.")

Memorandum of Agreement.

Agreement made this 1st day of October, 1897, between Thomas Milner Harrison and L. C. Ables, both of the city of Auckland, and William Cowper Robison, of Kihikihi.

Whereas by agreement dated 21st of September, 1897, between the said Harrison and the said Ables the said Harrison did assign to the said Ables certain claims he had against the said Robison and certain interests he had in Okahukura and other lands in West Taupo, and whereas the said Robison had certain sheep grazing on the said lands.

Now these presents witnesseth:

That the said Ables and the said Harrison release the said Robison from all claims whatsoever they may have against him.

2. That the said Robison hereby assigns to the said Ables all interest he may have in the said sheep.

3. That the said Robison hereby agrees to assign to the said Ables at any time upon the demand of the said Ables any interests he may have in the said lands.

In witness whereof the said Thomas Milner Harrison the said L. C. Ables and the said William Cowper Robison have set their hands the day aforesaid.

(Sg.) T. M. HARRISON.
(Sg.) L. C. ABLES.
(Sg.) W. C. ROBISON.

Signed in the presence of
J. H. KIRKPATRICK,
Auckland, N. Z.

Endorsed and filed Jan. 18, 1905. Geo. Lucas, Clerk.

419 In the Supreme Court of the Territory of Hawaii.

THOMAS MILNER HARRISON, Plaintiff-Appellant,
vs.
J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES and DOROTHEA EMERSON, *née* LAMB, ET ALS., Defendants-Appellees.

Thomas Milner Harrison, the plaintiff-appellant herein, asks the permission of this Court to amend his petition for rehearing of this

cause, by calling the attention of the Court to the following important authority omitted from the said petition for rehearing.

The case referred to is McNeild *v.* Reid 9 Bing. 68; also 10 Mew's Digest 406. The syllabus of this case reads as follows: "Damages may be recovered upon an agreement by one of several partners to introduce a stranger into the firm, although the agreement be entered into without the knowledge of the firm.

"It is sufficient consideration for such an agreement, that the stranger will become a partner."

Tindall, C. J., in ruling on this case said: "Three objections have been made to the plaintiff's right to retain his verdict:—First, that no action lies on the contract disclosed by the evidence in this cause; and that objection divides itself into two considerations,—one, that the plaintiff was aware of the fact that others persons were already in partnership with the defendant, consequently that the defendant could not, without the consent of such persons, force a stranger into the firm; and that the plaintiff cannot seek to enforce a contract which at the time he knew to be impossible. But this is no answer in the mouth of the defendant; for he should have secured the consent of his partners before he ventured to enter into such a contract; or is bound, at all events, to obtain it afterwards."

Bosanquet J.: "I think this verdict ought not to be disturbed. It is objected, that the contract is of such a nature that the defendant could not perform it without the consent of his partners; but that does not discharge the defendant from his contract, for he ought not to have engaged in it unless he had secured that consent."

(Sg.) T. M. HARRISON, *Plaintiff.*

Endorsed and filed Jan. 24, 1905. George Lucas, Clerk.

420 Supreme Court of the Territory of Hawaii, October Term, 1904.

T. M. HARRISON
v.
J. A. MAGOON ET AL.

HONOLULU, MONDAY, *February* 20, 1905.

Clerk's Minutes.

Motion for Rehearing.

Before Frear, C. J.; Hartwell, J., and Circuit Judge De Bolt.

T. M. Harrison appeared for the Plaintiff and Kinney, McClanahan & Cooper and S. H. Derby for the defendants.

Mr. Harrison reads motion for re-hearing and argues.

Mr. Derby argues.

Mr. Harrison replies.

The Court takes the matter under consideration.

(Sg.) GEORGE LUCAS, *Clerk.*

421 T. M. HARRISON

v.

J. A. MAGOON, F. B. MCSTOCKER, L. C. ABLES, DOROTHEA EMERSON, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFERDEN, and G. D. MOORE.

Petition for Rehearing.

Argued February 20, 1905; Decided March 6, 1905.

Frear, C. J., Hartwell, J., and Circuit Judge De Bolt in Place of Wilder, J.

REHEARING—*denied the petition therefor being based on misapprehension of former decision.*—A rehearing is denied where the court based its former decision on the ground that the contract sued on was incomplete, and not, as contended, on the ground that it was not several as well as joint, or that, if it was only joint, a recovery could not be had against such of the parties thereto as had undertaken without due authority to bind all.

AMENDMENT—*by appellate court, no error being found in judgment below.*—Although the statute permits amendments to be made after judgment and on appeal, and amendments should be allowed more freely when, as in this case, a new action would be barred by the statute of limitations, this court should
422 not allow the plaintiff an amendment which would be ineffective without a new trial and then arbitrarily reverse the judgment below and grant a new trial in order to make the amendment effective, when no error is found in the judgment below.

Opinion of the Court by FREAR, *C. J.*

This is a petition for a rehearing of the case reported ante, p. 332. It is based upon two grounds. The first is that at the original hearing the plaintiff, who is the petitioner, relied upon the ruling made in this case in 13 Haw. 360, that the contract sued on was joint and several, and argued that if the contract was joint and not joint and several, and some of those purporting to join in the contract were not liable, a recovery could be had against such of them as had undertaken without due authority to bind all jointly, whereas the court, as it is contended, reconsidered the former ruling and held that the contract was joint, and not joint and several, and overlooked the argument that even though it was joint a recovery could be had against some of the parties thereto if not against all. This ground is based upon a misapprehension of the view that the court took in its recent decision and which is set forth, clearly as it seems to us, on pages 338 and 339, ante. That decision was based on the ground that the contract sued upon was incomplete, whether it was joint and several or only joint in form. Among other things the court said, on page 339:

"An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not binding upon any of them unless all execute or subsequently ratify the agreement." It was also pointed out in that decision that the court, as it was constituted when the ruling was made that the contract was joint and several, considered it still an open question whether the contract was complete or not. With reference to this the court in its recent decision (page 338), referring to the earlier decision, used this language:

"In denying the plaintiff's motion for a rehearing of the decision sustaining the demurrer the court said: 'Whether or not if it
423 shall appear hereafter that some of the persons named as defendants neither executed nor subsequently ratified the execution of the agreement, the others can still be held jointly liable, * * * are questions which have not yet arisen and upon which no opinion is expressed.' 14 *Ib.* 532. The court evidently had in mind the question whether the agree-ent would be complete unless all signed or ratified."

The second ground relied upon for a rehearing is that, even if the first ground should not be sustained, a rehearing should be had for the purpose of allowing the plaintiff to amend his complaint and then have a new trial. The amendment proposed is one by which the case would be changed from an action against all the present defendants upon the special contract, or for a breach of that contract, based on the failure of the company to give the plaintiff, upon his dissatisfaction with the condition of the partnership business in Tasmania, stock of the value of £2,000 in some other district of the company's field of operation, in exchange for his inter-st in the company represented by £2,000 recited to have been paid in by him, to an action against the defendant Ables for the value of about 6,000 head of sheep and an interest in certain land, which in fact, instead of the £2,000 recited, was turned over by the plaintiff to the said case, a new action would be barred by the statute of limitations.

It is urged that this amendment may be allowed now by this court under the broad provision of the statute relating to amendments (Revised Laws, Sec. 1738) and under the view expressed in Dowsett v. Jones, 9 Haw. 543, and the cases there cited, to the effect that an amendment should be more freely allowed when, as in the present case, a new action would be barred by the statute of limitations.

We regret that we cannot take this view. It is true that the statute is broad and that it expressly permits amendments of certain kinds after as well as before judgment, but this does not mean that in addition to allowing an amendment the court may, at it would have to do in this case in order to make the amendment effective, re-
424 verse the judgment of nonsuit below and order a new trial when no error is found in the judgment below. If that judgment had been reversed and a new trial ordered, the court might also grant leave to amend before the new trial should be had. Likewise if the amendment were merely to conform the complaint to the proof, or otherwise was designed to support the judgment below, it might be allowed here, and of course, in such case, it would be

effective without reversing the judgment below or ordering a new trial. The difficulty is that no error has been found in the judgment below, and in the absence of error that judgment cannot be reversed merely for the purpose of allowing an amendment and making it effective. This is the view generally taken elsewhere. For instance, in Sutter *v.* San Francisco, 26 Cal. 112, in which a similar proposition was made, the court said:

"The appeal is from the judgment, and we find no error to vitiate it. We hold that the court committed no error, so far as the record shows its action, and that the judgment is in all respects legal. We cannot, therefore, reverse it, for we find no error to justify such action, and plaintiff cannot now amend, because there is a valid final judgment; and there is nothing more to be done, without first reversing this judgment. It would be an anomaly in legal proceedings to hold the judgment in all respects correct, and then arbitrarily reverse it."

To the same effect, see People *v.* Jackson, 24 Cal. 630; Gibbons *v.* Scott, 15 Cal. 285; Colorado Springs Co. *v.* Hopkins, 5 Colo. 338; Denison *v.* Tyson, 17 Vt. 549.

Most of the cases cited contra by the plaintiff are not in point. The case of Balcom *v.* Woodruff, 7 Barb. 13, however, is somewhat in point, for in that case the statute was almost identical with ours and the statute of limitations would have barred a new action, although other circumstances in the case were somewhat different from those in this case. The court there allowed an amendment *nunc pro tunc*, and then, without finding error in the judgment of nonsuit below, set aside that judgment and ordered a new trial in order to make the amendment of avail to the plaintiff. In support of this course
425 the court cited an earlier case in the same jurisdiction (Holmes *v.* Seely, 17 Wend. 75), but said:

"This relief, however, is granted under the peculiar circumstances of this case, and the case is not to be made a precedent. The general rule is that a party who has not applied for an amendment until he has been nonsuited, is too late to ask for a new trial, in addition to an amendment."

In that case, it may be added, the plaintiff had moved in the lower court for leave to amend and for a new trial, as well as to set aside the judgment of nonsuit.

A rehearing is denied.

The plaintiff in person, *Robertson & Wilder* also for the plaintiff. *J. A. Magoon; J. Lightfoot; Kinney, McClanahan & Cooper*, and *S. H. Derby for defendants.*

(Sg.) W. F. FREAR.
(Sg.) ALFRED S. HARTWELL.
(Sg.) J. T. DE BOLT.

426 In the Supreme Court of the Territory of Hawaii.

THOMAS MILNER HARRISON, Plaintiff-Appellant,
vs.
J. A. MAGOON, F. B. MCSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, GEORGE D. MOORE and J. WOLFENDEN, Defendants-Appellees.

To the Honorable the Judges of the Supreme Court of the Territory of Hawaii:

Comes now the above named Plaintiff-appellant, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above entitled cause becoming final therein on the 6th day of March, A. D. 1905, manifest error hath happened to the great damage of said Plaintiff-appellant.

Wherefore, said Plaintiff-appellant prays for the allowance of a Writ of Error, and for an order fixing the amount of bond for costs and fees, in said cause, and for such other orders and process as may cause the same to be corrected by the Honorable the Supreme Court of the United States.

Dated Honolulu, T. H., 26th May, A. D. 1905.

(Sg.) T. M. HARRISON,
Plaintiff-in-error.

(Sg.) CASTLE & WITHINGTON,
Attorneys for the Plaintiff-in-error.

Endorsed: T. M. Harrison *vs.* J. A. Magoon, *et als.* Petition for Writ of Error. Filed June 6, 1905. Henry Smith, Clerk. Castle & Withington, Att'ys for Pl-ff.

427 In the Supreme Court of the United States.

THOMAS MILNER HARRISON, Plaintiff in Error,
vs.
J. A. MAGOON, F. B. MCSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, GEO. D. MOORE, A. E. POWTER, and J. WOLFENDEN, Defendants in Error.

In Error to the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now comes the plaintiff-in-error in the above entitled cause and says, that in the record of the proceedings in said cause in the Supreme Court of the Territory of Hawaii there is manifest error, in this, to wit:

1. That there was error in overruling the exceptions by the plaintiff-in-error to the refusal of The Circuit Court of the First Judicial Circuit of the Territory of Hawaii, to consider the merits of the

Motion for New Trial duly presented to the said Circuit Court; and to the Dismissal by the said Circuit Court of the said Motion for New Trial.

2. That there was error in overruling the exception of the plaintiff-in-error to the nonsuit as to all or any of the defendants-in-error rendered in said Circuit Court, and in not reversing the judgment and ordering a new trial in said Circuit Court as to each and all of the defendants-in-error.

3. That there was error in overruling the exception of the plaintiff-in-error to the nonsuit as to the defendant-in-error Ables, and in not reversing said nonsuit as to the said Ables and ordering a new trial in said Circuit Court as to him.

4. That there was error in overruling the exception of the plaintiff-in-error to the nonsuit as to the defendants-in-error other than Magoon, McStocker and Emerson, and in not reversing said nonsuit as to the defendants-in-error other than Magoon, McStocker and Emerson and ordering a new trial as to said defendants-in-error other than Magoon, McStocker and Emerson.

428 5. That there was error in holding that there was no evidence to go to the jury to prove that the defendants-in-error, Magoon, McStocker and Emerson, were bound by the agreement declared on, or had ratified the same.

6. That there was error in deciding that the said agreement declared on is not joint and several; and that the said agreement was incomplete and ineffective and the nonsuit properly ordered upon the "failure of the plaintiff" to prove that "all of the defendants executed or ratified the agreement declared on," when the law of the case as laid down by the said Supreme Court of the Territory of Hawaii in its decision rendered herein on demurrer on 10th April, 1901, (13 Hawaiian Reports 360) holds: "The agreement sued on (quoting from it) 'witnesseth; for and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated,' and then goes on to specify the details of the contract. As we construe this clause, it is in effect as though the language used had been, that for the consideration stated 'the parties of the first part do hereby, jointly and severally, make, with the parties of the second part, the following agreement of partnership.' The contract made in the opening clause by the parties of the first part is joint and several, and the contract there made is that the details of which are specified in the succeeding clauses. If paragraph 4 stood entirely by itself, it would probably be construed to mean that the members of the 'company' jointly were liable for the promise there set forth to give Harrison certain stock upon the happening of a certain contingency. The paragraph, however, cannot, we think, be read by itself; it must be read in connection with the opening sentence above quoted, and if so understood the result is the finding that the promise in question was a joint and several obligation on the part of the members of the company."

429 7. That there was error in refusing to consider the exceptions of the plaintiff-in-error to the rulings of the said Circuit Court as to the admission and rejection of evidence.

8. That there was error in refusing to consider the exception of the plaintiff-in-error to the order of the said Circuit Court excluding the evidence of the plaintiff-in-error as to his knowledge of the whereabouts of the defendant-in-error Ables after 10th March, 1898, and before the said Ables was served with a Summons at Honolulu, Hawaii, about 23rd July, 1898, from the Supreme Court of New Zealand in an action brought by the plaintiff-in-error against the defendants-in-error on the agreement declared on.

9. That there was error in neglecting to order a new trial in said Circuit Court with leave to the plaintiff-in-error to amend his declaration so that he might sue for the value of the sheep and lands conveyed as consideration for the agreement declared on as for a *quantum valebant* or *quantum meruit,* because the said plaintiff-in-error was taken by surprise in that he could not expect it to be held that the agreement declared on was not joint and severa., and, therefore, incomplete and ineffective.

(Sg.) T. M. HARRISON,
Plaintiff-in-error.

(Sg.) CASTLE & WITHINGTON,
Attorneys for the Plaintiff-in-error.

Endorsed: T. M. Harrison *vs.* J. A. Magoon *et als.* Assignment of Errors. Filed June 6, 1905. Henry Smith, Clerk. Castle & Withington, Att'ys for Plaintiff.

430 In the Supreme Court of the Territory of Hawaii.

THOMAS MILNER HARRISON, Plaintiff-Appellant,
vs.
J. A. MAGOON, F. B. MCSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN, and GEORGE D. MOORE, Defendants-Appellees.

Upon application of the Plaintiff-appellant herein, and upon filing a petition for a Writ of Error and an Assignment of Errors, it is ordered that a Writ of Error be and hereby is allowed to have reviewed in the Supreme Court of the United States, the judgments hereinbefore entered herein; and that the amount of bond on said Writ of Error be, and hereby is, fixed at $500.00.

Honolulu, T. H. June 6, 1905.

(Sg.) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Endorsed: T. M. Harrison *vs.* J. A. Magoon *et als.* Order Allowing Writ of Error. Filed June 6, 1905. Henry Smith, Clerk. Castle & Withington, Att'ys for Plaintiff.

431 In the Supreme Court of the Territory of Hawaii.

THOMAS MILNER HARRISON, Plaintiff-in-Error,

vs.

J. A. MAGOON, F. B. MCSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, GEO. D. MOORE, A. E. POWTER, and J. WOLFENDEN, Defendants-in-Error.

Bond on Appeal.

Know all men by these presents: That we, Thomas Milner Harrison, W. R. Castle and D. L. Withington, all of the City of Honolulu, on the Island of Oahu in the Territory of Hawaii, are held and firmly bound unto the above named, J. A. Magoon, F. B. McStocker, Dorothea Emerson, L. C. Ables, T. E. Cowart, J. H. Kirkpatrick, Geo. D. Moore, A. E. Powter and J. Wolfenden in the sum of five hundred dollars, to be paid to the said J. A. Magoon, F. B. McStocker, Dorothea Emerson, L. C. Ables, T. E. Cowart, J. H. Kirkpatrick, Geo. D. Moore, A. E. Powter, and J. Wolfenden, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals, and dated the 6th day of June in the year of our Lord one thousand nine hundred and five.

Whereas the above named Thomas Milner Harrison has prosecuted an appeal to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit, by the Supreme Court of the Territory of Hawaii:

Now, therefore, the condition of this obligation is such, that if the above named Thomas Milner Harrison shall prosecute said appeal to effect and answer all damages and costs, if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

(Sg.) T. M. HARRISON. [SEAL.]
(Sg.) W. R. CASTLE. [SEAL.]
(Sg.) D. L. WITHINGTON. [SEAL.]

Approved by
(Sg.) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Endorsed: T. M. Harrison *vs.* J. A. Magoon *et als.* Bond on Appeal. Filed June 6, 1905. Henry Smith, Clerk. Castle & Withington, Attorneys for Plaintiff-in-error.

432 In the Supreme Court of the United States.

THOMAS MILNER HARRISON, Plaintiff-in-Error,
vs.
J. A. MAGOON, F. B. MCSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, GEO. D. MOORE, and J. WOLFENDEN, Defendants-in-Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the Territory of Hawaii, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Hawaii; before you, or some of you, being the highest Court of law or equity of the said Territory of Hawaii, in which a decision could be had in the said suit, between, Thomas Milner Harrison, Plaintiff-Appellant, and Plaintiff-in-error, and J. A. Magoon, F. B. McStocker, Dorothea Emerson, L. C. Ables, T. E. Cowart, J. H. Kirkpatrick, A. E. Powter, J. Wolfenden and Geo. D. Moore, Defendants-Appellees, and Defendants-in-error, wherein the matter in dispute exceeds the sum of Five Thousand Dollars, a manifest error hath happened, to the great damage of the said Thomas Milner Harrison, Plaintiff-in-error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so
433 that you may have the same at Washington on the 13th day of September next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 14th day of August A. D. 1905.

(Sg.) HENRY SMITH,
[SEAL.] *Clerk of the Supreme Court of the Territory of Hawaii.*

Allowed by:
(Sg.) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

434 In the Supreme Court of the United States.

THOMAS MILNER HARRISON, Plaintiff-in-Error,
vs.
J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEO. D. MOORE, Defendants-in-Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. A. Magoon, F. B. McStocker, Dorothea Emerson, L. C. Ables, T. E. Cowart, J. H. Kirkpatrick, A. E. Powter, J. Wolfenden and Geo. D. Moore, and Messrs. Kinney, McClanahan and Cooper, Attorneys for J. A. Magoon, F. B. McStocker, Dorothea Emerson and L. C. Ables:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's office of the Supreme Court of the Territory of Hawaii, wherein Thomas Milner Harrison is Plaintiff-in-error, and you are Defendants-in-error, to show cause, if any there be, why the judgment rendered against the said Plaintiff-in-error as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, this fourteenth day of August in the year of Our Lord one thousand nine hundred and five.

(Sg.) W. F. FREAR,
[SEAL.] *Chief Justice of the Supreme Court of the Territory of Hawaii.*

(Endorsed:) In the Supreme Court of the United States. T. M. Harrison *vs.* J. A. Magoon *et al.*. Writ of Error & Citation. Filed Aug. 14th, 1905. Henry Smith, Clerk. Castle & Withington, Attorneys for Plaintiff in Error.

Service of a copy of the within Writ of Error and Citation Admitted this 14th day of August, 1905.

J. ALFRED MAGOON,
J. LIGHTFOOT,
Attorneys for the Defendants in Error.
KINNEY, McCLANAHAN & COOPER,
Attorneys for Defendants.

435 In the Supreme Court of the Territory of Hawaii.

THOMAS MILNER HARRISON, Plaintiff-in-Error,
vs.
J. A. MAGOON, F. B. MCSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, GEO. D. MOORE, and J. WOLFENDEN, Defendants-in-Error.

UNITED STATES OF AMERICA, *Territory of Hawaii, ss:*

I, Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the foregoing pages, numbered from 1 to 434, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Thomas Milner Harrison, Plaintiff-appellant and Plaintiff-in-error, against J. A. Magoon, F. B. McStocker, Dorothea Emerson, L. C. Ables, T. E. Cowart, J. H. Kirkpatrick, A. E. Powter, Geo. D. Moore and J. Wolfenden, Defendants-appellees and Defendants-in-error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Honolulu in the Territory of Hawaii, this 15th day of August, in the year of Our Lord, one thousand nine hundred and five, and of the Independence of the United States the one hundred and thirtieth.

[Seal Supreme Court Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

Endorsed on cover: File No. 19,890. Territory of Hawaii supreme court. Term No. 107. Thomas Milner Harrison, plaintiff in error, *vs.* J. A. Magoon, F. B. McStocker, Dorothea Emerson, L. C. Ables, T. E. Cowart, J. H. Kirkpatrick, A. E. Powter, J. Wolfenden, and George D. Moore. Filed August 30, 1905. File No. 19,890.